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ARGUMENT
OF
HENRY L. CLINTON, ESQ.,
ON THE PART OF THE CONTESTANTS,
IN THE
Rollwagen Will Case.

BEFORE THE
SURROGATE OF THE COUNTY OF NEW YORK,

Delivered March 31st and April 1st, 1874.

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ANTOR, LENOX AND
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BEFORE HON. ROBERT C. HUTCHINGS,
Surrogate of the County of New York.

IN THE MATTER
of the
PAPER WRITING PROPOUNDED AS
THE LAST WILL AND TESTA-
MENT OF FREDERICK ROLL-
WAGEN, *Deceased.*

ARGUMENT

OF

HENRY L. CLINTON,
Counsel for Contestants.

MARCH 31st, 1874.

May it please the Court :

Many and strange and varied have been the scenes developed in evidence on trials in this Court. Yet no case ever before brought to light such a scene as that witnessed on the night of the eleventh of October, 1873, at 312 Ninth street, in this City. Let us for a moment revert to that scene.

The unlettered millionaire, Frederick Rollwagen, lies stretched upon the bed of sickness. The hand of death is

upon him. Around him are none bound to him by the strong ties of nature, none allied to him by blood. A servant girl, of ripe age, who profanes the name of wife, is there with her famished and poverty stricken brood of relatives. With joyous expectation they await the moment of mortal dissolution. They believe that death to him is life to them; that the gloom of poverty is to be exchanged for the splendor of wealth. Soon the great event of their lives—his death—will be an actuality—a certainty.

Among those around the dying man is one sincere friend who, in humble life as she is, does honor to the name of woman. She is a mother. She has the heart of a mother. She knows a father's devotion to his children. She, who was born in the same place and about the same year as the dying man, brought up with him, his playmate in childhood, who years after he came from a foreign land to this country, followed him hither with her husband and family,—upon her arrival in this City, was first greeted by him her only acquaintance here—this good woman, is by the bedside of the friend of her childhood, of her mature years, of her old age, ready and anxious to perform any office of kindness in her power. As she beholds him, separated from death by at most a few hours, perhaps a few minutes, she thinks of his children. She desires that when their aged father breathes his last they shall be near. Permission to go for them is refused. Lena Herrmann, who desecrates the sacred name of wife, forbids the departure of any one upon this errand of mercy. With soul steeped in avarice, and tongue on fire with falsehood, she exclaims to this devoted, faithful friend of over sixty years, "Father don't want any of them near him."

The good woman—Barbara Koch—remains until the last pulsation of life has ceased. Of all under that roof she feels sincere grief. Even then she who performs in the *rôle* of widow, will not permit the sad news to be borne to the dead man's sons; she dreads the coming of relative or friend of his. With indecent haste she and her brother

hurry away the good woman from the presence of her dead friend. Lena Herrmann seems to fear that he who had hitherto acted as undertaker for this afflicted family—who had buried the mother of the children of the deceased, who had buried his second wife,—might, in obedience to wishes of relatives, officiate on this occasion. She acts as though she fears that Frederick Rollwagen's death may not be assured to her, unless her friend shall bury him. Before break of day she sends for her friend Theisz. Not until long after Frederick Rollwagen is cold, stark and stiff, are his children permitted to know that he has ceased to live. Theisz officiates as undertaker. In due time the funeral ceremonies are over, the burial scene is ended, and the curtain falls upon the first Act.

Soon—very soon—the next Act begins. Conspicuous upon the stage we behold this ambiguous widow, bearing in her right hand, unfolded at full length, a bastard will, a bastard codicil, and with her left, pressing to her bosom, a bastard, suckling child. In this drama the Herrmanns are cast in the leading parts. Henry Herrmann is chief plotter. Lena Herrmann is chief mourner. Her friend, Theisz, is chief swearer. Among those assigned leading parts, but who perform only as chief of supernumeraries are the lawyer Bellesheim and the physician Goulden. The plot thickens. We begin to understand why Lena and her vulture brood of relatives on the night of the eleventh of October, hovered so close around the prospective corpse—why no relative of the dying man was permitted to enter his presence. Now the Herrmanns gather courage. Their nerves are strung with hope; their hearts beat high with expectation. They feel safe. Old Rollwagen is in his tomb. He cannot burst the cerements of the grave. He cannot spring from out the ground to throttle them in their villany—to scatter to the four winds their schemes of spoliation and robbery. The old man is safe under the sod. The Herrmanns demand his property. They demand that the bastard will and the bastard codicil shall be spread upon the records of this

Court, and that judgment shall pass in favor of the bastard child. They demand that the descendants of the dead millionaire shall be robbed of their own, to enrich this dubious widow, the central figure in this group of as vile schemers and remorseless plotters as ever stained the pages of history, or ~~defiled~~ the records of any criminal Court.

When the next Act begins we trust the curtain will rise upon the children and grandchildren in possession of their inheritance, the fruit of half a century of toil and struggle of their dead ancestor. We trust that we shall also behold the chief conspirators in this grand scheme of villany brought to the bar of justice.

The sons of the deceased, Frederick Rollwagen, knowing that, unless their father's mind were irretrievably lost or overpowered by undue influence, fraud or circumvention, he would never permit the making of such a will and codicil as have been presented, ask that this Court affix to them the brand of judicial condemnation. So long as the deceased lived, so long as he had sufficient intellect to be a responsible human being, so long was he noted for his affection and devotion to his children and grandchildren. With him family ties were strong. Parental affection was the leading characteristic of his nature. Between him and his children he permitted no fire-brand to be thrown. He was as stubborn and unfaltering in his devotion to them as in the accumulation of property. To these two objects his whole life was given. All his living children and the children of his deceased child, present a united front before this Court. They are resolved that the life-long wishes of the decedent, in respect to his property, shall not be buried in his grave. Unless the law shall so decree, they will never submit to be robbed of their inheritance—their birthright—either by this ambiguous widow or her suckling prodigy, called "Magdalena, the younger." What an extraordinary child! American children are usually forward. This one is pre-eminently so. Application was made to the Supreme Court, for a jury of matrons, to determine before its birth,

the question of its existence. Instead, a commission of three physicians was appointed. Under such auspices it has been ushered into existence. Three learned doctors, thus commissioned, have determined that it was not a myth—that it was an actuality—a positive entity—that it was born into the world after the manner of infants from time immemorial; that it was not a “figment of the brain,” a creature of the imagination of its putative mother;—that from the brain of the leading conspirator against the estate of the decedent, it did not, like Minerva from the brain of Jupiter, spring into existence fully armed and equipped. In one particular it was more precocious than Minerva. Before its birth it was fully armed and equipped; it was clothed with panoply of the law. When numerous and interested parties, the Court and all concerned, were in doubt as to its existence—whether it was “quick”—the result proved that it was not only “quick,” but so quick in the assertion of its legal claims, as to set the Courts in motion and incite forensic battles of no ordinary character on the part of learned lawyers.

Some have been content to engage in legal warfare after youthful ardor was chilled by advancing age. But this suckling babe, which caused so much commotion in the Courts before it was born—which carried on such a successful *ante natal* warfare—is no sooner brought into the world with such pomp and legal ceremony—actually born under an order of the Supreme Court, duly made at Special Term—required before its birth to show cause *instantly* why it should not be adjudicated a fraud or a myth,—this extraordinary “little one” no sooner opens its eyes to the light, than its first squall is a trumpet sound summoning to legal battle—to fierce, unrelenting legal warfare—the contending hosts of relatives, friends, and acquaintances of the late millionaire—the deceased Frederick Rollwagen.

When scarce three weeks old it appeared in this Court, through its duly appointed guardian and chosen counsel, and was ready to give instant battle to whomsoever might

oppose its claims or gainsay its pretentions. Valiant little one! Heroic infant!

In this contest, in which so many are engaged, in which so many have a common interest, four branches of the Rollwagen family uniting in a common warfare, unwilling to recognise this little intruder, this bold adventuress, as one of themselves, bone of their bone, and flesh of their flesh—in this legal strife it stands single handed and alone.

Not content with giving battle to the four branches of the Rollwagen family, from its legal position and extraordinary relations to the case, it is compelled to embark in deadly legal warfare against its mother, to the end that it may overturn and destroy the alleged will and codicil produced by her, on the ground that they are not the will and codicil of the millionaire Rollwagen, but the will and codicil of herself—the almost life-long maiden who, when far advanced in years, for the first time became a mother.

How she atoned for nearly half a century of celibacy! She was not ruthlessly cut down by the matrimonial scythe in the flower of youth. If married at all, it was when she had attained the dignity of a venerable flower—an ancient rose. She would have us believe (late in life though it were) she thought that

“Earthlier happy is the rose distilled
Than that which withering on the virgin thorn
Grows, lives and dies in single blessedness.”

But little over two short years ago she would have us believe that she, the ancient, venerable maiden, became the innocent, blushing bride. Happy woman! Married to a millionaire in his dotage! He for two years before his death an imbecile and a paralytic! Impossible as it was for him again to become a father, after his death his putative widow becomes the mother of a child. Extraordinary child! extraordinary mother! wonderful coincidence! Knowing the millionaire's impotency, did she invoke, with reference to him, the legal principle, *Qui facit per alium facit per se*? However correct the principle in the abstract,

such an application of it is as bad in law as in morals. Or did she, in her tender regard for the decedent, rely on the law as laid down by Othello—

“ He that is robbed, not wanting what is stolen,
Let him not know it, and he is not robbed at all.”

A more extraordinary case than that which is now before this Court for adjudication has never arisen in this city. A will and codicil than which none more infamous were ever made are presented for probate.

What are the provisions of those instruments? Fraud appears upon the very face of them. The will is dated June 17, 1873. It gives Lena Herrmann (or Rollwagen as she chooses to be called) absolutely the house No. 312 Ninth street, with the furniture, &c. It gives her one-third of all decedent's remaining personal property. It gives her one-third of the net rents of his real estate during the natural life. The remaining portions of the personal property are to be divided as follows: One-fourth to Frederick Rollwagen, Jr., one-fourth to Louis Rollwagen, one-fourth to George Rollwagen, the remaining fourth to be invested for the benefit of the children of Rollwagen's deceased daughter, Sarah Browning, and to be paid to them upon their arriving at the age of twenty-one years respectively. After taking out one-third of the rents of the real estate for the widow, the balance is to be divided as follows: One-fourth to Frederick, one-fourth to Louis, one-fourth to George, the remaining fourth to be invested on bond and mortgage for the benefit of the Browning children, to be paid to them when they respectively attain the age of twenty-one years, together with the interest thereon accrued or accumulated. The fifth clause of the will provides that none of the real estate shall be sold or divided until the youngest grandchild living at the death of Lena shall have attained the age of twenty-one. Rollwagen's children are only to have portions of the rents above described “during the term of their natural lives,” the fee to

be vested in their lawful issue them surviving, and the surviving children of Sarah Browning, when the youngest then living shall have attained the age of twenty-one years. The seventh clause of the will provides that Henry Herrmann, one of the executors, shall let and rent the real estate, and divide the ~~rents~~^{rents} as in the will previously directed. Magdalena Rollwagen is appointed executrix, and Henry Herrmann, George Herrmann, and Frederick Rollwagen, Jr., are made executors.

The provisions of the codicil are still more extraordinary. This instrument, purporting to have been executed on the 5th of September, 1873, gives Magdalena the four houses and lots known as Nos. 165, 167, 169, 171 Avenue A. The codicil provides that each of the children thereafter born shall have an equal share in both his real and personal estate, as the other children of the decedent. The codicil does not state how many are expected to be born thereafter.

By the will and codicil the heirs-at-law and next of kin of the decedent are virtually disinherited. The so-called widow, who, for two years and a half before her alleged marriage, was employed by Mr. Rollwagen as servant and housekeeper, at the rate of fourteen dollars per month, absorbs nearly the whole estate. The evidence shows that the house she lives in is worth, at least, twenty-three thousand dollars. The presumption is that each of the others she receives by the codicil is equally valuable. The portion of the income of the estate to be distributed among the heirs of the decedent is to be reduced by a child in whose veins, as we claim, there flows not a drop of Rollwagen blood. Thus a fifth of the two-thirds of the rents is to be diverted from the Rollwagen family. Then, after the estate has been administered upon by this putative widow and her two brothers, the life interest which Mr. Rollwagen's heirs have in a fractional part of the estate, is subject to the extraordinary provision in the will which renders this interest merely nominal, namely, that Henry Herrmann is

to collect the rents and *manage* the estate until the youngest grandchild living at the death of Lena, shall have attained the age of twenty-one years. That contingency, if the so-called Magdalena the younger shall be adjudged legitimate, may not happen for the next fifty years. One would have supposed that Lena, in the event of her becoming the lawful widow of the decedent, would be content with her dower interest, which would give her an income of from twelve to fifteen thousand dollars a year, especially in view of the fact that for about the first forty-five years of her life, and up to the time she claimed to have been married to the decedent, she probably never expended two hundred dollars in any one year. It would seem, however, that the greed of herself and family knew no bounds.

The law casts the burthen of proof upon the proponents. It is incumbent on those who offer for probate an alleged will or codicil, to prove clearly and satisfactorily that it embodies the wishes of the decedent at the time it was executed; that its provisions were understood by him, and that in letter and spirit the requirements of the statute in relation to the execution of testamentary instruments were observed. If, in any *one* of these respects, the proponents fail in their proof,—if in reference to any one of these particulars the evidence is even equally balanced, so that it is neither proved nor disproved,—then, within the meaning of the law, there is a failure of proof, and probate must be refused.

The Court of Appeals, per Davis, *J.*, in *DeLafield v. Parish*, 25 N. Y., p. 35, held that:

“It is not the duty of the Court to strain after probate, nor in any case to grant it, when grave doubts remain unremoved, and great difficulties oppose themselves to so doing.

“That the heirs of a deceased person can rest securely upon the statutes of descents and distributions, and that the rights thus secured to them can only be divested by those claiming under a will and in hostility to them, by

showing that the will was executed with the formalities required by law, and by a testator possessing a sound and disposing mind and memory."

No will can be admitted to probate except in pursuance of the following provision of the Revised Statutes:

"If it shall appear upon the proof taken, that such will was duly executed; that the testator, at the time of executing the same, was in all respects competent to devise real estate, and not under restraint, the said will and the proofs and examinations so taken, shall be recorded in a book to be provided by the Surrogate, and the record thereof shall be signed and certified by him."

3rd R. S. 139, Sec. 10 (5th ed.).

Upon the conceded and undisputed facts in this case the proponents have failed to establish any one of the various matters necessary for them to prove, before either instrument offered can be admitted to probate.

I shall not rest content in this case with the utter failure of proof on the other side.

I propose to demonstrate upon the conceded facts—the undisputed evidence—upon the testimony of proponents—that the law, beyond all peradventure, imperatively forbids that either will or codicil should be admitted to probate.

I propose to show that at the time these instruments were executed, it was impossible for the decedent to make a valid will or codicil.

I propose to show that he did not, in fact, sign, or authorize any one else to sign for him, either of the instruments propounded for probate; that he did not, in fact, publish or declare either as his testamentary instrument, or ask any one to witness either instrument.

I propose to show that if all the evidence, except that given on behalf of proponents, were stricken from the case, upon the law laid down by the Court of Appeals, it would be the bounden duty of the Surrogate to render judgment in favor of contestants.

I propose further to demonstrate, upon the testimony

that, instead of rebutting the legal presumptions of undue influence, fraud and circumvention established by the undisputed evidence—by the testimony of the subscribing witnesses—the proponents, by affirmative evidence, have proved an overwhelming case of undue influence, fraud and circumvention, provided decedent possessed sufficient mental capacity to expose him to such influences.

If any one of these four propositions be established, the law adjudges the will and codicil void. I shall demonstrate *all* of them.

As the evidence in this case is so voluminous, extending over nearly two thousand printed pages, I have deemed it proper to so arrange my observations that the Court can at once perceive, upon reference to the testimony, whether I am right or wrong in my conclusions.

FIRST.—The physical condition of the decedent was such, before and at the time of the execution of the will and codicil, that, whether he possessed testable capacity or not, it was impossible for him to cause his testamentary intentions to be so embodied, in a written instrument, that the Court would adjudge such instrument to be his will or codicil.

If decedent possessed sufficient mental capacity to make a will, he had no way of making his testamentary intentions known. He could not communicate his thoughts either by speech or writing or by signs. He could not read; he could not write. For a long time before his death he had not the power of speech. The deceased was never able to read or write, with the exception that when in health he could write his name. When the instructions were given for the will and codicil, and at the time of the execution of

each of these papers, the decedent could not and did not speak. As to this fact I will show when I come to that branch of the case that there can be no doubt whatever; I will show it, too, by the evidence of proponents.

I will now call your attention to the physical condition of the decedent from 1859 to 1871.

If I succeed—as I must if I collate and present the evidence properly—in showing that it was a physical impossibility for the decedent to so communicate his thoughts and wishes that they could be embodied in a testamentary instrument, that is the end of this case so far as the proponents are concerned. If, instead of showing this—as I shall—the testimony merely fails to show, within the rules of evidence, that such was the fact, then the law imperatively demands, at the hands of the Surrogate, a refusal to admit either instrument to probate.

The decedent was born, as the testimony shows, in the year 1807. He came to this country, from Germany, in 1829. He amassed in his business considerable property. His investments were chiefly in real estate. At the time of his death, as appears by the testimony, his real estate amounted to over half a million of dollars. He was, according to the evidence, which the proponent's took such pains to elicit, addicted to the excessive use of spirituous liquors, although, perhaps, not in the ordinary and offensive sense an intemperate man. As early as 1859 his constitution began to break. The testimony shows that in that year he was overtaken by rheumatism; some of the witnesses call it apoplexy; and from that time his constitution grew weaker and weaker.

The fact that the decedent could not write renders it important to ascertain whether he was deprived of the power of speech. If he were, then the means of communication with the outside world were closed to him. There is no

ground in the evidence for any claim that the decedent was able to communicate his thoughts and wishes by means of any clearly understood and well defined signs. Hence the importance of the evidence showing that Mr. Rollwagen at the time of the execution of the will and codicil, and for a long time prior, was utterly deprived of the power of speech.

I shall arrange my observations upon my first point under the following sub-divisions:

First.—I shall show the physical condition of the decedent from 1859 to 1871.

Second.—I shall show what was his physical condition in 1871.

Third.—I shall discuss the physical condition of the decedent in the year 1872.

Fourth.—I shall show what his physical condition was in the year 1873.

The first evidence to which I will call your attention on this point is that of *John Moser*. He testified that he had known Rollwagen twenty years, and that he was one of his most intimate associates (fol. 1411); that in 1859 Rollwagen had a stroke, as he calls it, of "apoplexy"—the trouble was probably rheumatism (fol. 1413). It was so severe that he could not raise his right hand (fol. 1415). In 1863 he began to get hoarse, and his voice sank a little every year (fol. 1423). In 1862 and 1863 he could not dress or undress himself (fol. 1424). From this time he was not able to use his fingers (fol. 1427). In 1867 he began to lose his recollection, and could not count his money when he went to collect his rents (fol. 1430–31). That evidence is undisputed. Although Mr. Rollwagen could neither read nor write (with the exception of writing his name), yet there is evidence showing that he could count money and

read figures. Up to this time he was able to count his money. I am not aware of any testimony throughout the case which contradicts this evidence of Moser to which I have called your attention.

Martha Miller, a witness called by proponents, a washer-woman, says that about fourteen years ago Mr. Rollwagen had a severe attack of rheumatism, that she attended him about eleven weeks, and that during that period she was with him day and night. She states that when his health improved he went to Sharon Springs (fol. 4079-80).

William Finkernagel, a witness called by proponents, says that in 1869 he had business with Mr. Rollwagen; that he did some repairing for him in Hester street. He says in that year Mr. Rollwagen "spoke like a man that had a cold" (fol. 3728); that "he was speaking like a man that had a big cold" (fol. 3728); that in 1870 he "spoke very hard."

To a large extent I shall quote the exact expressions of these witnesses, for the reason that their language is terse and expressive.

Frederick Geissenheimer, a lawyer of ability, whom I have known since his admission to the bar, with whom your Honor is well acquainted, a gentleman of integrity, occupying a high position in his profession and in the community, testified that he had been the counsel of Mr. Rollwagen from the time of his (Mr. Geissenheimer's) admission to the bar, in the year 1846. He stated that, even before his admission, he commenced doing some business for him, such as searching titles. Mr. Geissenheimer was the professional and confidential adviser of Mr. Rollwagen from 1846 to 1873. We all know that no motive under Heaven would tempt Mr. Frederick Geissenheimer to swerve a hair's breadth from the truth in this or in any other case in which he might give evidence. He testified that some five or six years ago he observed that Mr. Rollwagen was hard of hearing (fol. 1216).

Julius Feldheim testified that he had known Mr. Rollwagen since 1853 (fol. 1660), a period of over twenty years ; he observed in 1866 that he was sick " with a kind of rheumatism " (fol. 1661-2). On the subject of his voice he testified as follows :

" Q. At this time in 1869, did you notice anything in regard to his voice at the time you sold him the house ?"—[referring to the house in Ninth street].

" A. His voice had been failing him considerably." (Fol. 1664.)

Your Honor will recollect that Mr. Feldheim is the gentleman who sold to Mr. Rollwagen the house No. 324 Ninth street, in which he lived from 1869 until the middle of June, 1873, when he removed to the house No. 312 in the same street. Mr. Feldheim further testifies :

" Q. Then the first you noticed was when you sold him this house ? How did he speak at that time ? Can you imitate it ? Was it a whisper, or above a whisper ?

" A. It was about a whisper. It was a kind of hoarseness, as I considered it—*ugh, ugh, ugh.*"

This, as described by Mr. Underhill, the stenographer, is an inarticulate sound, issuing from the throat, and from which no one can understand what is meant. He describes it as

" [a sound slightly vocal, characterized by both nasal and rough guttural qualities, and assimilated to a harsh grunt]." (Fol. 1665-6.)

Mr. Feldheim further says that in 1869,

" you had to look out very sharp to catch the words, the way they came out." (Fol. 1666.) " It was sometimes different with him ; sometimes he spoke two or three words in that way, and then he spoke a while, and then this would go on"—

giving the same sound previously described (fol. 1667).

Jacob Moore states that he knew Mr. Rollwagen for

eighteen years (fol. 2074). He gives the particulars of Mr. Rollwagen's sickness in 1859 and 1860 (fols. 2077-79). He states that after Mrs. Browning's death, which occurred in 1867, he noticed that Mr. Rollwagen was failing very fast (fol. 2084). It was not unnatural that such should be the case. His constitution, as I have said, was undermined by his too free use of spirituous liquors; he had lost his wife; he had lost his only daughter, to whom he was deeply attached, as all the evidence shows; he was then somewhat advanced in life; and from that time he failed very rapidly. Mr. Moore says that he could not walk as formerly, and that his hearing was impaired. He says:

"In 1859 he told me that he was beaten one evening "upon the head very severely." (Fol. 2078.)

This may account for some of Mr. Rollwagen's characteristics, which were subsequently developed. When in health, although he was not a man of sharp intellect, he possessed good business capacity. Mr. Moore says that about this time (1869) "he told me once that his legs were "not able to carry his body hardly." (Fol. 2088.)

Catharine Monninger, the mother of the wife of Louis Rollwagen, says that she saw Mr. Rollwagen in 1868; that his speech at that time was "heavy (fol. 2286); it was a kind of gurgling noise in the throat when he talked" (fol. 2286). She says that in 1869 he talked "a great deal worse" than in 1868 (fol. 2290). He would say a word or two, and then the words would get mixed up with "yes" and "well" (fol. 2291). This witness states that at this time it was so difficult for Mr. Rollwagen to enunciate more than a word or two at a time, that it was almost impossible for him to carry on even a brief conversation. She testifies as follows in relation to his difficulty of utterance (fol. 2291):

"Q. State whether he seemed to talk with difficulty or "with ease?

"A. Very hard. I think you could tell by his eyes he

"squeezed the words out. . . . He would say a word "or two and would stop."

Henry Monninger, a son of the witness last referred to, and a brother-in-law of Louis Rollwagen, says that he had known Mr. Rollwagen since 1869, and that at that time it was very difficult for him to speak; that his whole conversation consisted of a few words, such as "yes," "well" (fol. 2667), and a few monosyllables of that character. In describing the manner in which he spoke, when he could only enunciate a word or two at a time, he says that it was "kind of dragging like" (fol. 2669).

Barbara Koch, who had known deceased from childhood, says that at this time it was very difficult for him to speak. She says :

"When I came there, in 1870, he was able to talk about two or three words together.

"Q. After talking two or three words, what then?

"A. Then he had to stop; he could not talk any further." (Fol. 3033.)

She also states that he spoke at that time with great difficulty. I have thus hurriedly glanced at the evidence on both sides on the subject of Mr. Rollwagen's condition between the years 1869 and 1871.

I will next call your attention to the testimony in respect to his physical condition in the year 1871.

On that subject John Moser says that he

"Saw Mr. Rollwagen in 1871, in the basement of his house. I perceived at once that something was the matter, because he could not speak. He made a motion with his tongue, but you could not understand him. I asked him how he was doing, and raised up his head. He could not give his *right* hand, and I raised up his *left* hand, and the tears ran down his eyes." (Fol. 1434-6.)

By-and-by I will show your Honor that upon the evi-

dence in this case there is not a shadow of doubt that Mr. Rollwagen, for upwards of two years, was paralyzed; that the form of paralysis with which he was afflicted was *hemiplegia*, beginning at the head and affecting one-half of the body. Many of the witnesses show that he was unable to use his right hand. Other witnesses, on the part of proponent, testify to the contrary. I can understand very well how they might be mistaken; because on the part of proponents' witnesses there was nothing to call their attention to the fact whether he used his right or his left hand; but the attention of the witnesses for contestants was specially called to the subject. They were well acquainted with decedent, and had particular reasons for noticing that he did not use his right hand. Mr. Moser, as I have stated, was one of his most intimate acquaintances; he was a countryman of Mr. Rollwagen; he was probably more intimate with him than any other man in the city of New York; and if Mr. Moser could not understand what he said—or, rather, what he tried to say—then the other witnesses, whose evidence I will refer you to hereafter, certainly could not. Mr. Moser further testifies:

“Q. Did he make any noise . . . a noise issuing from his lips?

“A. Ghagh, ghagh, ghagh, ghagh—[a harsh, guttural, inarticulate sound, accompanied by a movement of his hand.]” (Fol. 1436.)

This was in the Fall of 1871. From this time until his death—I care not what these other witnesses may say, because they are very liable to be mistaken—from that time until his death, the evidence shows that Mr. Rollwagen was not able to utter a sentence, a word, nor a single syllable which could be comprehended by his most intimate friends.

Frederick Geissenheimer states that he saw Mr. Rollwagen in 1871. He says: “It was about the time that *he had an attack of what he called paralysis.*” (Fol. 1056-7.) We have had witness after witness on the part of proponents, called

for the purpose of showing that this man had not paralysis. The chief schemer in this plot, when upon the witness stand, actually swore that so late as the Summer of 1873 Mr. Rollwagen had no paralysis. Henry Herman swore to that, in spite of the fact that the paralysis was proved by a host of witnesses, and by medical testimony beyond all dispute; and I can only say in respect to such testimony, and of the man who could come here and utter such an untruth, I wonder that his own tongue was not paralysed—that his own lips did not blister with the perjury he was uttering. Mr. Rollwagen said that he had paralysis; Lena Hermann said over and over again that he had paralysis; the physicians said that he had paralysis; and if there be any fact established in this case beyond all peradventure, that fact is so established. His death is not more clearly proven than is the fact that he had paralysis. Mr. Geissenheiner says that Mr. Rollwagen told him that he had paralysis; and that

*“He seemed to be pretty well shattered under it, and not capable of moving about as formerly; and also in speaking his voice was low. * * * I had to pay very close attention to his voice, and could only pick up a word here and there, and make up from the context.”* (Fol. 1057.)

Charles P. Stephens, who had known Mr. Rollwagen for twenty-two years, who had long been his barber, and continued to officiate in that capacity until three or four years ago, in speaking of the changes in Mr. Rollwagen in 1871, says: “The first I found that he had lost his speech.” (Fol. 1249.) This is the expression of the witness who had been his barber for so many years, who had also had other business relations with him, who had borrowed money from him—a small amount it is true—and who went to his house frequently to pay interest. He had borrowed from Mr. Rollwagen five hundred dollars, and the interest was due semi-annually. He testifies:

“Q. What did you observe?

"A. I wanted to speak to him, but I could not understand him. He could not answer.

"Q. He did not answer?

"A. No, sir.

"Q. Did he make any noise?

"A. 'M 'm 'm 'm and ghagh, ghagh, ghagh, ghagh."

[The witness gives the sound which the stenographer has correctly described as a rough guttural breathing, slightly vocal.]

"I could not understand him at the best. He made a motion to Lena; she got some wine." * * * * *

"He could not drink. He was very nervous, and very weak. I found him so every time I went there." * * * *

"Q. Did he utter one word or syllable which you could understand?

"A. I could not.

"Q. Did he say anything more than make a noise which you have imitated?

"A. I could not understand.

"Q. I will put another question: will you make the noise he did.

"Ghagh, ghagh, ghagh."

[Again making a harsh guttural breathing, slightly vocal.]

"Q. Was that the only speaking he did?

"A. That is all." (Fol. 1257 to 1261.)

William Schloss, an interpreter of one of the Police Courts of the City, had known the decedent for twenty-three years. He testifies that in the Summer of 1871, when Mr. Rollwagen was building a house in Hester street, at the corner of Allen street, he observed him. The witness testified:

"I saw him sitting on the opposite corner. I went over and shook hands with him, and asked him, 'How do you do?' *He could not answer me.* He made motions with his hands." [Showing a movement of the hands, with the palms down, being lifted up from the lap and lowered again.] * * * "He could not speak; at least I could not understand him.

"Q. Did he make any noise with his throat?

"A. Yes, sir; he attempted to speak, but I could not understand him. * * * *

"Q. Did you try to speak to him more than once?

"A. Oh, yes, very often." (Fol. 1490-3.)

He states that during this year he noticed some changes in Mr. Rollwagen; he also states that four or five years before he died, he noticed certain changes in him, and that, "he walked as if *he was paralyzed*; lame. * * * * * "That he noticed then his tongue was very heavy already, "although I could not understand him." (Fol. 1496.)

George A. Stadler says that in 1871 he was Inspector and Surveyor in the Department of Buildings in this City, and was introduced to Mr. Rollwagen. He saw him in relation to some defect in a building owned by him, and in which he then was. He told Mr. Rollwagen that if he did not attend to the repair of his building in respect to fire escapes, he should report him to the Board. Mr. Rollwagen said nothing. He could not and did not utter a word during that interview. He simply looked at Mr. Stadler—stared at him. Mr. Stadler had never seen him before; he has no interest whatever in this case; and if there were anything, in respect to which according to the testimony of proponents, Mr. Rollwagen would be keen and active, it would be regarding his property. They seek to show, on the other side, that he was a careful, money-making, business man. When a stranger, and an official, came to him and told him that one of his buildings was defective, and that he would report him to the Department of Buildings unless the matter was remedied, Mr. Rollwagen certainly had interest enough in the subject to respond, if he were capable.

Henry Werner, a painter, testified that he had known Mr. Rollwagen for the last ten years of his life, and had business with him in 1871, when he built the house on the corner of Allen and Hester streets. He saw him outside of the liquor store across the way from the new building—

about the same place where he was observed by the witness, Schloss. This painter had had business with Mr. Rollwagen for years, and was a countryman of his. If any one could understand Mr. Rollwagen, one would suppose that this witness could; yet in 1871 he could not understand him. I am free to say here that while some of the witnesses during the early part of 1871, say that Mr. Rollwagen could not speak at all, others state that he did now and then speak a word, but that he could carry on no intelligible conversation. Mr. Werner says that he got out a word or two at a time; and then, in his expressive language, "he got it all in a heap again," (fol. 2401). The witness had previously stated that Mr. Rollwagen had pronounced one word in his hearing which he could understand, but that was a word which did not require any great intellectual capacity to comprehend—it was the word "drink." He uttered that word with great difficulty; the witness says "it came out heavy" (fol. 2402). The men about him understood it, and immediately responded by entering the saloon and drinking at the bar. Mr. Rollwagen then made motions towards the building, and uttered the word "Beers," which was the name of his agent and superintendent; and from his uttering that word, Mr. Werner understood him to mean that he (Werner) should go and see Mr. Beers, which he did. Mr. Werner had called at that time partly for the purpose of humoring the old man, and partly for the purpose of getting another job. Finding, however, that Mr. Rollwagen was incompetent to transact any business, and that he could not communicate his ideas, the witness did not even apply for the job he had in view in calling. On that occasion he took Mr. Rollwagen home, and during the ride he did not, and could not, utter an intelligible word. Mr. Werner must have been with him for at least an hour or two, and yet during all that time he was able only to utter the words "drink" and "Beers" (fols. 2401 and 2406), and was entirely unable to communicate his ideas to any greater extent.

Another witness, in this connection, gave testimony of importance, namely: *Anthony Dugro*, a brother-in-law of Frederick Rollwagen, Jr., a countryman of decedent, a friend who had sustained intimate relations with him for some thirty years. If anyone were able to understand Mr. Rollwagen we would naturally suppose that Mr. Dugro could. He states that in the year 1871—in the fall of the year—he was riding in a Second Avenue car, when some one made motions towards the car conductor to stop; and Mr. Rollwagen attempted to get on the platform. Mr. Dugro had not seen him for a considerable time, and he was struck with amazement at the change which was apparent. He asked Mr. Rollwagen where he was going. He could say nothing, but in his broken and disjointed manner he got out that which Mr. Dugro understood to mean “Bank,” Rollwagen saying “Ba, bah—bak” (fols. 1533-4), as Mr. Dugro indicated while on the witness stand. Had not Mr. Dugro known Mr. Rollwagen, and had he not also been aware of the fact that he was a director in the Murray Hill Bank, he would not have been able to comprehend what Mr. Rollwagen meant. Mr. Dugro assisted him out of the car, and I presume that he went to the Bank at that time, although the evidence is silent upon that subject. This was in the Fall of 1871. I will now call your attention to a more recent period of time.

I will show what was the physical condition of Mr. Rollwagen in the year 1872.

I have thus far dealt briefly with the evidence relating to decedent's physical condition from the year 1859, up to the commencement of the year 1872. I prefer to discuss the facts as far as practicable in chronological order, for the reason that I think that such a presentation of them will enable the Court more accurately to get at the merits of this branch of the case. As time rolled on, Mr. Rollwagen's

condition became much worse. In 1872 he was much worse than in 1871.

Early in February, 1872, Mr. Rollwagen was present for the last time at a meeting of the Directors of the Murray Hill Bank.

James Striker, the cashier, testifies that Rollwagen said nothing when questions were put; he didn't vote yes, or no, with the others.

During the time he was in the Bank on this occasion, he did not say a word to any one. Mr. Striker says he noticed that Rollwagen was "*quite feeble and unable to carry on any conversation.*" It was very evident that his physical condition was very bad (fols. 2003 to 2008).

Frederick Pfluger, a grocer in the vicinity of Mr. Rollwagen's residence, and an acquaintance of his son Louis, states that in February, 1872, he called to see the decedent. Mr. Louis Rollwagen introduced him to the old gentleman. I believe that Mr. Pfluger had not spoken to him up to that time. Mr. Rollwagen did not then speak to Mr. Pfluger, for the reason that he could not. Mr. Pfluger testified as follows :

"Q. What did you say ?

"A. I took Mr. Rollwagen by the hand, but he did not make any reply, though he looked at me.

"Q. He did not reply ?

"A. He looked at me, but did not speak.

"Q. Do you remember which hand he took hold of?

"A. I think the right hand.

"Q. Did you shake his hand ?

"A. Well, I shook it a little; not much. I saw that he was very sick.

"Q. Did he shake hands with you at all ?

"A. No, sir; he did not move at all.

"Q. He did not move his hand at all ?

"A. No, sir." (Fols. 1591-2.)

During this time Lena was present, as she always was when the children or grandchildren of the decedent, or any of their friends, were there :

"She brought in some wine," the witness says, "for Mr. Louis and myself, and she prepared some for the old gentleman, which she gave him with a spoon."

The witness states that at this time :

"Mr. Rollwagen's tongue was always visible ; his mouth was always open and never closed,—not even when swallowing." (Fols. 1594-5.)

Here are some physical features of the case, which are important with reference to Dr. Tulley's evidence, and which will be referred to more particularly in their proper order. This witness cannot be mistaken as to these physical appearances, because they tally exactly with the medical evidence which has been given in this case ; and these various witnesses, who knew nothing of the medical importance of their statements, have given the facts showing that Dr. Tulley's opinion is not only correct in theory, but founded upon facts disclosed in the evidence.

At this time Lena was feeding decedent with a spoon, as she would feed a child. The witness further testifies :

"Q. During all the time that you were there, did Mr. Rollwagen, the deceased, say anything?

"A. No ; he never made a sound." (Fol. 1597.)

Julius Feldheim states that, in the Spring of 1872, Mr. Rollwagen could not speak. He testifies :

"Q. Did he make any noise ?

"A. The same ; his voice was the same [making the same sound he had made before].

"Q. Repeat the sound as nearly as you can ?

"A. The sound that he made was 'ugh,' 'ugh,' 'ugh.'

"Q. He made no other sound ?

"A. No, sir." (Fols. 1671-2.)

During that entire interview he said nothing.

"Q. Did you notice the condition of his *hand* as you took it ?

"A. I saw it was *swollen and cold*, as I found it." (Fol. 1673.)

Swollen and cold ! These are symptoms of the hemiplegia, according to the medical testimony.

“ Q. Did he move his hand at all ?

“ A. I could not feel anything.

“ Q. Did you undertake to shake hands with him ?

“ A. Yes, sir.

“ Q. Did you feel any *pressure* of his hand ?

“ A. Not at all.” (Fol. 1673.)

Then Lena told him what the old gentleman wanted of him. And mark you—this was the man who purchased his real estate for him, the man whom he had known for years, the man who sold him the house in which he lived. At this time Lena wanted to buy another house. This scheme of hers, to get into a house, which in point of comfort, size, and in every other respect far surpassed any house in which Mr. Rollwagen had ever lived, developed itself as early as 1872. She sent for Mr. Feldheim, and told him what kind of house she wanted. She did all the talking. She did all the business. The pretence here is the same as it was in the Parish will case—that the widow was the medium of interpreting the thoughts of the decedent; that she could tell from certain signs,—mysterious in themselves, but which she had learned to understand,—just what he said. Your Honor will mark, throughout this evidence, the tergiversations and the various subterfuges resorted to by proponents (I do not allude to the counsel, but to his clients). At one time the explanation is that Lena listened by putting her ear to his lips when he spoke; at another time, that she understood in some other way; and so it varies continually. The chief pretence is that she put her ear to his lips, and actually heard what he enunciated, and understood the syllables and words he attempted to utter. The testimony of Mr. Feldheim on this point is important. She professes at this interview to carry on a conversation, or rather that Mr. Rollwagen is carrying on a conversation through her with Mr. Feldheim.

You will observe that all the witnesses, on both sides,

when they called upon Mr. Rollwagen on business, did him the courtesy of addressing *him*. That formality was observed by all who called on him, during the entire period embraced in the evidence here. Mr. Feldheim did the same. He addressed Mr. Rollwagen. Lena told Mr. Rollwagen what he said; and then she told Mr. Feldheim what she claimed that Mr. Rollwagen said in reply. This was simply a sham and a pretence. *It was Lena talking all the time.* She was not interpreting Mr. Rollwagen's thoughts. She was simply giving her own. On this occasion she halloed in his ear what the witness said. At other times she did not do that. She went through this form, because at this very time (as I will show in another branch of my argument) she was scheming with a view to get this property, and she was manufacturing testimony to be used after he died. She was performing a part, as it was claimed that Mrs. Parish did, for the purpose of being able to prove after he died that she interpreted his thoughts. She therefore went through the form of pretending to report what she alleged that Rollwagen said. The witness testified as follows:

"Q. What did she say as she halloed in his ear ?

"A. She told the price that I said was asked for the property.

"Q. What did she say after she halloed in his ear ?

"A. Then she *looked at his mouth, or his lips*, and then "she told me that it was too much, and that he would not "buy this." (Fol. 1676.)

That is to say, she claimed to read with her eye the meaning of every movement of his lips; that her eye had become so keen, so disciplined—because accustomed to gaze on her prospective hundreds of thousands out of the Rollwagen estate—that she could thus read the language of his lips.

This is entirely inconsistent with most of the evidence on the other side. And here I will call your attention to the fact that Lena has not been called as a witness in this case. Hereafter I will invoke your attention to what the Court of

Appeals say of a party who has large interests at stake, who is charged with the utterance of certain declarations, or with the performance of certain acts which militate against her, and yet does not see fit to go upon the stand and contradict them. Lena, by not going upon the stand to contradict what has been said of her,—by that very omission, admits the truth of the evidence.

“Q. During all that time did she [Lena] tell you what Mr. Rollwagen wanted ?

“A. She told me that *she could see on his lips what he wanted*. She was the one who did the talking (fol. 1683).

“Q. Did she halloo in his ear ?

“A. Yes, sir.

“Q. Then after she hallooed in his ear, what would she do, would she look at his mouth ?

“A. Yes, sir.

“Q. And then tell you what he said ?

“A. Yes, sir.

“Q. She didn't *put her ear to his lips* ?

“A. No, sir; she *looked at them*.

“Q. Then tell you what she said he said ?

“A. Yes, sir.” (Fols. 1684-5.)

If she could *see* the words on his lips, why did she put her ear to his lips on other occasions, when she wanted to impress other persons with the idea that Mr. Rollwagen was talking and that she interpreted and repeated *only* what *he* said.

Soon after this interview she sent for Mr. Feldheim to call again. He subsequently called, and proceeded to unfold his business to Mr. Rollwagen and Lena. This was a repetition of the previous interviews. He testifies in respect to it as follows :

“Q. Did he [Rollwagen] say anything ?

“A. He made the same sound again.

“Q. He made the same kind of sound with his mouth as when you saw him before ?

“A. Yes, sir.

“Q. Then did he make that noise with his throat ?

“A. Yes ; the same noise.

"Q. No word or syllable that you could understand?

"A. No, sir; I could not understand a word—nothing."
(Fols. 1680-1.)

Lena then asked the witness if he knew of any other houses that Rollwagen could buy. He talked with Lena about the property and remained there about three-quarters of an hour. During this second interview she pretended to read on the lips of Rollwagen what he said, just as she had done at the first interview.

In the early part of the year 1872, *Frederick Geissenheimer* testifies, that he had occasion to call on Mr. Rollwagen upon business. He testifies as follows:

"Q. State on the first occasion, in 1872, that you particularly remember what you observed.

"A. I observed that I could not converse with him at all.

"Q. Why?

"A. I could not get any answer, except 'm-'m-'m, [a nasal sound made with the mouth closed and accompanied with a nod.]

"Q. Giving a nod of the head with that particular sound?

"A. With that sound. There was a lady there present who seemed to be his wife, and she interpreted that to "me." (Fol. 1073-4.)

It is claimed here that Mr. Rollwagen was able to talk by making affirmative and negative answers. In the Parish will case, your Honor remembers that it was claimed that Mr. Parish, when asked a question, would shake his head and in that way make a negative or affirmative answer. Many of the witnesses in that case testified, as they have here, that he said "yes" or "no." The Court of Appeals in its final decision, was perfectly satisfied that during all this period Mr. Parish had never uttered a word, but that whether he did or not, it was not intelligible, or not sufficiently so, for him to give instructions with regard to his will. In that case, Daniel Lord, then at the very head of the Bar of this city, than whom no lawyer was more eminent in the United States—a man not only of the great-

est legal acquirements, but of the most unsullied integrity, stated on the witness stand, that he drew the codicil which was in dispute, in accordance with the instructions given by Mr. Parish ; that he struck out some of the provisions which he had drawn, because he was directed to do so by Mr. Parish. In other words, as he read clause after clause of the codicil, Mr. Parish would assent or dissent ; and Mr. Lord testified that in his opinion, the decedent was perfectly competent to make a will. The Court of Appeals overruled Mr. Lord, and held that, in a case like that, it would be a mockery of justice if such a party were allowed to make a will or codicil, which could be spread upon the records of the court, and control the distribution of property. In this case it is claimed that Mr. Rollwagen was in the habit of nodding or shaking his head. Mr. Geissenheimer states that Mr. Rollwagen always had that habit, that when he nodded, it did not mean "yes"; and that when he shook his head, it did not mean "no"; that a nod or a shake of the head might mean either the one thing or the other. He stated that it was a habit of Mr. Rollwagen, from which no inference could be drawn, and that he had had this habit long before he lost his voice and long before his mind was clouded. Geissenheimer testifies :

"Q. I ask you whether or not, you observed before this change in him, that habit of nodding ?

"A. He had a habit of nodding when he spoke.

"Q. During the time you knew him ?

"A. Well, for a good many years,—I may say for nearly all the time.

"Q. It was a habit of his ?

"A. Whether he agreed or whether he differed, he said, "Now Mr. Geissenheimer, I don't think, thus and so,"—[moving his head sidewise, to and from either shoulder.]

"Q. *Would he nod whether he agreed or differed ?*

"A. Yes, sir." (Fol. 1074—5.)

That nod of the head had nothing to do with the meaning which he intended to convey, and if a nod were to be considered as yes, and a shake of the head as no, he would

give the opposite meaning to that which was intended, as often as the correct meaning.

This interview which Mr. Giessenheimer describes, he says was in the Spring of 1873.

Mr. John Moser saw the deceased in 1872 sitting in the basement of his house; and he says:

"I stopped outside of the window and shoved the window up.

"Q. Was the one called Lena or Mrs. Rollwagen there?

"A. On this occasion when Mr. Sutter was with me, there was a young lady there—a stout lady they called Lena. Sutter told me she was his housekeeper * * * I raised the window where he sat. He sat in the front basement, and I then got down on one of my knees. Of course I was trying to speak, but it was no go. He commenced to cry again, and I left him. * * * * *

"Q. He said nothing, did he?

"A. No, sir.

"Q. Did he make any sound which issued from his lips?

"A. No.

"Q. How long did you remain there?

"A. About ten minutes; I would rather say less.

"Q. After you first spoke to him, did you make any further effort to talk to him?

"A. I could not.

"Q. You did not?

"A. No, sir; because *I took it to heart*. * * * *

"Q. You think that was in the Spring of 1872?

"A. Yes, sir.

"Q. Did you go to see him any more?

"A. No, sir; because *I pitied him too much*." (Fols. 1440-3.)

Your Honor will observe that that which Mr. Moser said was true, and had application to many, and in fact, to the greater part of the acquaintances of the decedent. About this time most of them ceased calling on him, for the simple reason that he presented to them such a pitiable appearance; he was such a complete wreck of his former self,

so utterly unable to talk with them, that the sight harrowed up their feelings. They knew that he could not communicate with them; and they could do no good to him. It is wonderful that in view of these disadvantages, most of his friends having ceased to call upon him, because he could not speak to them, we have been able to produce so many witnesses to prove that for a year or two before his death, he was utterly helpless and totally unable to utter a word. We have been able to prove that. Why? Simply because it is God's truth. And there is this peculiarity, in this, as in all cases—the easiest thing in the world to prove is the truth. Let witnesses attempt to falsify, and just so sure as there is a God in heaven, if they be followed up with the requisite skill, they will be detected.

The witnesses we have produced have been involved in no inconsistencies, in no more discrepancies than are peculiar to all human testimony; while the witnesses called by the proponents have been guilty of the greatest inconsistencies, and have stated as facts matters which by no human possibility could be true. Our proof is easy for the reason that I have given. Let the most ignorant witness if he be honest go upon the stand, I don't care who he is, and he may be cross-examined by the keenest lawyer that ever lived, and the more he is cross-examined the more the truth will come out; the brighter it will appear. But let the keenest witness take the stand—(I don't care whether his name is Herrmann or Theisz,) and manufacture a story, let him watch and guard that story to the utmost of his ability, yet it will take very little skill on the part of counsel to expose the falsehood.

David B. Arnold testified that he was a clerk of Mr. Frederick Rollwagen, Jr., and had from his boyhood known Mr. Rollwagen, Sr.; that in 1872 he passed the house in Ninth street almost every day, and when he did, as a general thing he saw Mr. Rollwagen sitting in the front area

of his house; that he made repeated efforts to talk with him, but that Mr. Rollwagen could not reply. He says:

"I very often stopped to talk to him—probably not more than 3 to 5 minutes at a time; at no time over 5 minutes.

"Q. When you talked to him, did he or not say anything in reply?

"A. He did not answer.

"Did he make any noise with his throat when you spoke to him?

"A. Yes, sir; he made this noise [making an inarticulate noise resembling a low grunt.]

"Q. A sort of gurgling noise?

"A. Yes, sir. I noticed *his tongue was very much swollen.*"

The witness states that his lips were open, the tongue swollen and protruding beyond the surface of the lips.

"Q. State whether that condition continued up to the time of his death?

"A. It did, sir." (Fols. 2488-90.)

The witness states that he shook hand with Mr. Rollwagen.

"Q. Which hand did you take when you shook hands with him?

"A. I used to take his *right* hand, but afterwards took his *left*. * * * * *

"Q. During all that time in 1872 whenever you saw him, and you talked with him, and you shook hands with him, did he at any time in your presence, raise his *right* hand or work his fingers or any of them at any time?

"A. No, sir.

"Q. After you observed that he did not move his right arm or hand or fingers at all did you shake hands with his *left* hand.

"A. I did.

"Q. Whenever you spoke to him in 1872, did he say anything whatever or speak any words or words, or syllable or syllables, to you?

"A. No, sir.

"Q. Did he do anything more than make the gurgling noise from his throat, of which you have spoken?

"A. No, sir." (Fols. 2493-5.)

Frederick Pfluger states that in August, 1872, he went with Louis Rollwagen to Mr. Rollwagen's house. He testified:

"They were at table. The old gentleman was sitting. He did not move. * * * Lena helped the old gentleman and gave him his meat; she cut it up for for him, and gave him his tea; gave it to him with a spoon.

"Q. Fed him like a child?

"A. Yes, sir; *fed him like a child.*" (Fol. 1601.)

During the entire time that Mr. Pfluger was there, Rollwagen said nothing. He states that when Lena was feeding this poor, imbecile, helpless child, he was in such a pitiable condition,—his mouth open, his tongue protruding, that when she administered to him with a spoon, he swallowed with great difficulty.

William Challier testified that he was a carpenter; that he had known Mr. Rollwagen for about six years; that he had worked for him as carpenter, repairing his houses, etc.; that he saw him in the Summer of 1872 at his house in Ninth street; that he called upon him on business, and that he also called there on a subsequent occasion. He says that Mr. Rollwagen did not speak at all during the interview, and that he did not speak to Mr. Rollwagen. I asked him why he did not speak to Mr. Rollwagen during that interview. That was objected to and ruled out. I put that question for the purpose of showing that he did not speak to him because Rollwagen could not speak. It was ruled out, and therefore the testimony goes for nothing, and no inference is to be drawn from the question asked.

Barbara Koch testifies that during 1872 and 1873, and up to the time of Mr. Rollwagen's death, Lena spoke to her on the subject of his condition. She says:

"Lena told me that she had to dress him and strip him, and wash him, and wash his clothes for him, sometimes

"two or three times in one day; that he did not feel it when he had to go somewhere.

"Q. You mean the calls of nature?

"A. Yes, sir; she had a great bother, she said." (Fol. 3038.)

Lena admits the truth of all this testimony, because if it were not true, or if she were not willing to be bound by it, it was her duty to go upon the stand, and disclose the facts. But Lena Herrmann, with her guilty conscience, which will sting her while life lasts, *would not for all the Rollwagen estate go upon the stand and be cross-examined.* She knew, or at least she believed, that if she went upon the stand it would be shown that she was guilty of a stupendous fraud; and the proof would come from her own lips. Unless she admitted her complicity in these transactions, she would have to contradict a host of witnesses of the most unsullied character. No! Lena Herrmann will never go upon the stand where she can be cross-examined in regard to her scheming and plotting, for the purpose of obtaining the estate of Frederick Rollwagen. Let her go upon the stand, and I would almost be willing to call no other witnesses in the case, because she would not have the ability to cover up the truth.

I will now call your attention to the witness who speaks during an important period, and in regard to facts about which she cannot be mistaken; a witness of great candor, who at a sacrifice and inconvenience to herself, left her home in the country, came to the city, and was detained here nearly a week in order to give her evidence in this case. I refer to *Barbara Sheppard*, a niece of the decedent, and the daughter of his sister next older than himself. Between her mother and the decedent there had existed from childhood the most ardent attachment. Mrs. Sheppard was the favorite niece of Mr. Rollwagen. She had known him, as she phrases it, from the time she "was old enough to know anybody." It had been Mr. Rollwagen's habit for many years to visit Mrs. Sheppard's place in the country.

His father had settled there; his relatives had settled there; many of his acquaintances, who had been brought up with him in Germany, settled in that place. Next to New York City, that was the home of the old man. He went there generally every year. While there he spent his time at the residence of his niece, Mrs. Sheppard. His visit, year after year, was looked forward to by that family with great interest. Your Honor knows, as people grow old, with what interest they revert to the scenes of their youth—to the days of their childhood; and with what tenderness they cling to early associations. In Verona and its vicinity were his early associates—his playmates in childhood, his friends who came from Germany.

In the year 1869, as usual, decedent visited his niece and sister at Verona. Mrs. Sheppard had not seen him since that time. In August, 1872, he again made his appearance. Mrs. Sheppard lived a short distance from the City of Rome. She and her husband were on their way to that city, and just before they arrived there they passed a carriage; as soon as Mrs. Sheppard saw that decedent was in it she gave a shriek of joy, exclaiming "Uncle Fred has come" (fol. 2685). Her husband stopped the vehicle. She beheld such a spectacle, it thrilled her with amazement—with horror. She says that when she saw him

"He looked very pale and ghastly, and in fact almost like a corpse; his eyes were sunken."

What a change! In 1869, when she had last seen him, he was in failing health, now he was utterly broken—the merest wreck.

Did he possess some glimmer of intellect at that time? We know not. Perhaps he did. We hope he did. We hope he possessed some intellect down to a late period; but whether he did or not, we cannot tell. We only know that he appeared to be an imbecile. To all human appearance his mind died one or two years before his body ceased to live. I assume that he had some intellect at that time, because when he saw this favorite niece, what did he do?

Did he speak? No; but the old man burst into tears. Mrs. Sheppard most cordially greeted her uncle and George who accompanied him, and directed them to go to her place in Verona. She and her husband hastened through their business at Rome, and returned home immediately. Mr. Rollwagen, Lena and George remained at Mrs. Shepard's two or three weeks. During all that time did this man speak? No. He was at home. He was away from the turmoil of the city. With one exception he had escaped even the pertinacious attentions of the Hermans—he had but one of them with him. It was represented that he and Lena were married; it was assumed that they were in fact married; but that question cannot be adjudicated upon here. When Mrs. Shepard saw her uncle, she was struck as I have said, with amazement. If there were any place on earth where this poor man, had he possessed any intellect or power of speech whatever, would have had his intellect kindled into action and his tongue unloosened, it was at that place and under those circumstances. There was no place aside from the bosom of his own family, aside from the circle of his own children and grandchildren,—where he felt so much at home as with this favorite sister and this favorite niece. While there his neighbors who had been accustomed to greet him at Verona for thirty or forty years—since they had settled there and he had settled here—his old friends from Germany—flocked round him; they tried to talk with him but they got no response,—whenever they spoke to him he said nothing, but the tears coursed down the old man's cheeks, as though his heart would break.

His own sister, two years older than himself, now three score years and ten, was assiduous in her attentions to him; she was with him every day. This favourite niece, also, was constantly at his side. They tried to administer to his wants; they persistently endeavoured to talk with him, but they got no response except the gushing tears of sadness, which told so plainly of the intellectual and physical

wreck which constituted the *remains* of the Frederick Rollwagen to whom they were so closely bound by the ties of affection and of blood.

Are those facts testified to by Barbara Sheppard true? Most unquestionably. If not true, why did not Lena Hermann go upon the stand and contradict them? She did not because every word testified to by Barbara Sheppard was known by her to be true. She did not go upon the stand to contradict anything testified to by anybody. She had an opportunity to become a witness; she could attend here. We had her subpoenaed and brought here because we desired to make *profert* of her before this court. She saw fit to admit the truth of all the evidence as to her conduct and declarations by not going upon the stand. Barbara Sheppard, like many other of the witnesses, stated certain physical appearances which are important in this case. She testified :

“Q. Did you observe his *tongue*, and what condition it was in at that time?

“A. *It would lie apparently flat in his mouth, and with rather of a thick appearance.*

“Q. When he moved his lips, when people were talking with him, did his tongue move at all?

“A. Not when his mouth was open so that I could see his tongue.

“Q. You may state whether, during the time his mouth was open, he seemed to move his lips or tongue, or whether they were entirely stationary.

“A. They apparently were.” (Fol. 2699 & 2670.)

I assume that the lamp of intellect had not entirely gone out at this time. It is immaterial for the purposes of this case, in a legal point of view, whether it had or not. Mrs. Sheppard testifies that on certain occasions decedent's eyes appeared to be restless.

“Q. State what you observed, if anything, in his movements when Lena told people who were talking what she claimed he had said.

"A. Sometimes he would motion with his eyes, and his head get restless as though it was not——

"Q. He would motion, and his eyes would get very restless ?

"A. Yes, sir." (Fol. 2702-3.)

Now, if he had intellect enough to appreciate what was said, those motions would seem to indicate that Lena did not interpret him correctly. If he had not any intellect then, we might attribute those motions to certain physical causes which cannot, perhaps, be wholly understood. Barbara Sheppard also testifies as to his habit of *nodding*. She says that it was his habit always ; and that when he nodded or shook his head he did not mean either assent or dissent ; that no inference could be drawn from this movement of the head.

"Q. State whether before that his habit of nodding or shaking his head had anything to do with yes or no ?

"A. I don't know that it did. It appeared to be an action.

"Q. Of the head ?

"A. Yes, sir.

"Q. That accompanied talking ?

"A. Yes, sir.

"Q. And when he made use of a nod of the head or a shake, whether it had any meaning—I mean previous to 1872—you could not tell ?

"A. No, sir." (Fols. 2704-5.)

She testifies to many other facts. She states that *during the whole period of that visit Lena fed him like a child*. He was not able to eat or to drink, and he was not able to attend to himself in respect to calls of nature. A more pitiable object was never presented to any relatives. He was as helpless as an infant six weeks of age,—utterly and entirely helpless ; and yet these good people, with the natural affection which they felt, the one for her brother and the other for her uncle, did everything in human power to soothe and comfort him, and if any intellect re-

mained to make his visit as enjoyable to him as possible. That he was unable to dress or undress himself at this time is proved and undisputed. This is important testimony, because in respect to other witnesses, it might be said that they saw Mr. Rollwagen only upon single occasions, that they called to see him upon business, and not remaining long, had but little opportunity to understand his real condition. But here is a witness who saw him every day for about three weeks, and generally, as she states, every hour of the day, except when he was out riding, or when he was asleep. Now, although as a general rule it is much easier to prove an affirmative than a negative, yet there are cases where it is just as easy to prove the negative. I say that it is inconceivable that if Mr. Rollwagen possessed the power of speech on such an occasion he would not have used it. Everything was calculated to induce him to talk if he could. He was with a niece with whom he had desired to hold confidential correspondence, as he had stated to her years before. He then regretted his inability to read and write. He said on "a former visit that oftentimes he would like to "write letters to her, and have her write to him on subjects "that he did not want known to anybody outside of his own "family circle;" and yet he was so situated that her letters to him must be opened and read by others than those allied to him by blood, and, therefore, he could not correspond with her as confidentially as he would desire. Under what circumstances would this man speak, if not under such as these, and on such an occasion? It is idle to contend that he had the power of speech. It is proved beyond all peradventure that he could not speak. The testimony of Barbara Sheppard has the same effect as though we had called her aged mother, and she had testified as did this witness. Mrs. Sheppard has testified to the declarations, acts, and conduct of the mother with reference to decedent. No witness has been called to contradict her, and the great, the damning, fact comes out at every stage of the case, that Lena herself dare not go upon the stand and contradict a

word of the evidence. On cross-examination of this witness the counsel endeavored to make a point against her, on the ground that she stated that she did not know—that is of her own knowledge as contra-distinguished from information—that Rollwagen and Lena had been married. Your honor will bear in mind that this witness was continually directed on her cross-examination to state nothing from *hearsay*, and only to state facts which came within her positive knowledge. The marriage of the decedent with Lena is denied in the objections filed by contestants. It is true that your Honor is not called upon in any way, to decide that question, or what may be the legal effect of the marriage ceremony performed by the Rev. Dr. Busche, in September, 1871. It is perfectly evident that this witness and her mother assumed that Mr. Rollwagen and Lena were married at the time of the visit to Verona in the Summer of 1872. The witness nowhere said that she had not *heard* that Rollwagen and Lena were married. It was entirely proper for her to say, as she did in substance, that she did not *know* the fact of her own knowledge. This witness on cross-examination testified as follows:

“Q. When did you first know that Mrs. Rollwagen (Lena) was the wife of Frederick Rollwagen?”

“A. I don’t know as I have ever known it. (Fol. 2830–31.)

* * * * *

“Q. Did you ever call her Aunt Lena?”

“A. I don’t know but I did, and I don’t know as I did.

“Q. Will you swear positively that you did not?”

“A. I don’t know as I can as to that.

“Q. Don’t you recollect that you did call her Aunt Lena?”

“A. I am in the habit of calling—

“Q. I am not asking you that; I am not asking you what your habit is?”

“A. Perhaps I did.

* * * * *

“Q. Along in the Summer of 1872, do you swear that you do not remember to have called her Aunt Lena?”

"A. I might have called her Aunt Lena.

"Q. I don't ask you what you might have done; but do you swear positively that you did not?

"A. I don't remember.

"Q. Did you ever write to your Uncle speaking of her as Aunt Lena?

"A. I cannot remember as to that.

"Q. What is your best recollection on that subject?

"A. That *I might have done so*.

"Q. That is your best recollection?

"A. Yes, sir. * * * *

"Q. Can you say you ever did address her as Aunt Lena?

"A. I might have done so.

"Q. Can you state whether you did or not?

"A. I don't know as I can."

(Fols. 2832 to 2835.)

It is apparent from this cross-examination that the witness intended to convey the idea that she *thought* she had spoken and written of Lena as "Aunt Lena," but her memory was not distinct upon that subject. The witness evidently did not recollect the terms of the letters which she had written. By her letters, written in the Fall of 1872, it appears that she had heard that Rollwagen and Lena had been married, and assumed that such was the fact. After the visit in 1872 some of the letters written by Mrs. Sheppard refer to Lena as "Aunt Lena."

There is nothing in the facts elicited on cross-examination, or proved by any other witnesses, which militates in any way against the credibility and integrity of this witness. If the facts stated by Mrs. Sheppard were not true, it was the duty of Lena to go upon the stand and so state under the obligations of an oath. Mrs. Sheppard was an entirely impartial and disinterested witness. She has no interest whatever in the case. It is but natural that her sympathies should run in favor of Mr. Rollwagen's children and grandchildren in this contest.

The attempt to shake the credibility, even in the slightest degree, of this witness, signally failed.

The next witness to whose testimony I shall invite your attention is Henry Heyneman, a gas collector in this city. He had been in the habit of collecting bills at Mr. Rollwagen's house for a year before he died. He says that so long as Mr. Rollwagen could speak he talked with him, and that during the latter part of the year 1872 he was unable to speak. He testified :

“ Mr. Rollwagen was unable, as much as I could perceive, to lift his hand ; so she (Lena) went with her hand in his pocket, took his pocket-book, paid me the money, closed it up again, and put it back in his pocket.” (Fol. 1799.)

This witness testifies that for a year before Mr. Rollwagen died he was not able to utter a word. I have quoted his testimony with reference to the year 1872, because to the last three months of that year his testimony applies.

I have now called your attention to the testimony of witnesses on the part of the contestants with reference to the physical condition of the deceased in the year 1872.

I will next review the evidence of proponents as to his physical condition during that year.

The first witness who speaks on this subject, whose name I have on my brief, is Philip Rettinger, a friend of Henry Hermann. He says he first spoke to Mr. Rollwagen at George Herrmann's house in 1869. It was most extraordinary that so many witnesses should be marched up here to prove that sometime in that year, 1869, Mr. Rollwagen visited this small lager beer saloon, and on that occasion fifteen or twenty persons were engaged in singing, and among the voices heard was that of Mr. Rollwagen. I shall not dignify that part of the case by dwelling on it at any length. Mr. Rettinger says that in the Fall of 1872, he with Mr. Henry Hermann called on Mr. Rollwagen. Mark you, this was just after he had come back from Verona, and when it is shown by the undisputed testimony of Barbara Sheppard that he could not speak. We have shown by a host of witnesses that during that entire year he did not talk at all,

that he did not speak even to his most intimate friends, and yet this witness, Philip Rettinger, says that he did speak to a certain extent. He says that he called with Henry Herrmann and said, "How do you do ;" and that Mr. Rollwagen nodded. He testified :

"Q. Did he say anything ?

"A. Well, *I didn't exactly hear him say anything that I could understand was for certain.* * * * He pointed to his wife "to get some wine. He called her and told her to get a "bottle of wine." (Fols. 3257-9.)

This witness says that after he said "How do you do" to Mr. Rollwagen, the latter tried to talk a little but could not. This is proponents' witness.

"He tried to talk a little and could not.

"Q. Did you hear him make any attempt to speak after that ?

"A. Yes, I saw him try to speak to people there.

"Q. Did you hear him say one word after that ?

"A. No, sir.

"Q. No word that you understood ?

"A. No sir. * * * *

"Q. Did you hear him make any noise from his throat ?

"A. A kind of noise—yes.

"Q. You could not understand anything he said, is that so ?

"A. No, sir ; I could not.

"Q. When you went in with Mr. Rollwagen, and spoke, "and he nodded, did not he make these sounds at that time, "or near these sounds, 'ughn, ughn, ughn.' [The obscure, "guttural sound previously described.]

"A. Not exactly that sound.

"Q. Something like it ?

"A. Well, a sound, of course ; the sound was there, but "not that exactly.

"Q. Was it that kind of a sound ?

"A. Well, yes. (Fol. 3331-3.)

"Q. Did you ever hear anybody, in your life, speak as "you say Mr. Rollwagen did on that occasion ?

"A. No, sir, I never did ; I never heard anybody. * * *

"Q. Did you notice it, then, because *it was so hard for*

"him to get out the sound; was that what called your attention to it ?

"A. Yes, sir." (Fol. 3338.)

This monsyllable was all that Mr. Rollwagen uttered according to the testimony of this witness, but even as to that the witness was undoubtedly mistaken. It is very natural that at this distance of time the witness should be mistaken, because had Mr. Rollwagen used the word that he says he did, there would have been nothing to impress that fact upon the witness ; whereas, the inability of Mr. Rollwagen to talk with his friends, was something that would be strongly impressed upon their memory. This was a witness not in our interest, but in the interest of the other side, who desired to do everything he could to help them. It is very evident that he was willing to give the proponents the full benefit of any possible sound or monosyllable which he thought he heard Mr. Rollwagen pronounce. This was the best he could do for proponents, although with peculiar candor he stated as he left the stand, that he was the bosom-friend and drinking companion of Henry Herman.

The next witness to whom I shall call your attention is Jacob Ernst, a lager beer brewer. He says that he knew Mr. Rollwagen for twelve years, to speak to him, and that he heard him sing in 1869 ; that previous to 1872, Mr. Rollwagen "walked badly and spoke hoarsely," that the last time he saw Mr. Rollwagen was in First avenue, in the Spring of 1872. He testified :

"Q. Did you then speak to him ?

"A. Yes, sir ; I asked him how he was.

"Q. And what did he say ?

"A. He said it was badly with him ; that he could not walk well, and he spoke hoarsely and coarse. (Fol. 3368.)

"Q. You say that he said that he was very badly ; repeat all that he said on that subject ?

"A. I asked him 'Mr. Rollwagen, how do you do ?' and he answered 'It goes badly. My feet—it is very hard for me to walk on my feet.'" (Fol. 3384.)

This witness was in George Herrmann's employ for seven years, as he testified, and of course he desired to do all in his power for the Herrmanns.

William Wagner testified that he was a brother-in-law of George Herrmann; that George Herrmann had married two of his wife's sisters; he would, therefore, naturally be supposed to adhere to their side of the case as far as he was able. He says that he got acquainted with Mr. Rollwagen in August, 1871; he was introduced to him by George Herrmann. He says that he, Mr. Rollwagen, his agent, and George Herrmann drank together. This witness desires us to understand that there is one thing which has left a lasting impression upon his mind (although he may be mistaken in regard to other matters), namely, the fact that he took a cocktail, whereas his habit was to drink lager beer. This departure from his usual rule in that respect has left an impression which time cannot efface.

He testifies that in January or February, 1872, he went with his brother-in-law to see Mr. Rollwagen. He says: "My brother-in-law spoke to him and introduced me to him" (fol. 3392); and that Rollwagen advised him not to buy a house in Essex street. At this interview Lena Herrmann and George Herrmann were undoubtedly present. If honest, the witness simply confounded what George Herrmann and Lena Herrmann said with what he thinks were the declarations of Mr. Rollwagen. He may have an honest impression now, so long a time having elapsed, that Mr. Rollwagen did speak to him, but he is simply mistaken. To show you how confused this witness is, I will invite your attention to the concluding part of his direct examination:

"Q. From all the conversation then had with him, and from what you saw at that time, did you deem him to be rational or irrational?"

"A. Sometimes I could understand what he was saying enough to make out about the property. That much I understood—that he was in possession of his senses. I

"half and half knew what he said about the property."
(Fols. 3396-7.)

Thus showing that Rollwagen did not say anything, but that witness mixed up some unintelligible noises made by Mr. Rollwagen with the declarations of the Herrmanns, who were present. He further testified :

" Q. From what you saw of him at that time, did you deem Mr. Rollwagen to be rational or otherwise ?

" A. I cannot tell." (Fol. 3400.)

The witness understood "rational" to mean whether Rollwagen understood what he was about, and the witness could not form any opinion whether he did or did not. He says that at this time Rollwagen did not speak above a whisper. He testified on this subject as follows :

" Q. Did Mr. Rollwagen speak above a whisper, yes or no ?

" A. He was speaking softly.

" Q. *Did he speak above a whisper or not ?*

" A. No." (Fol. 3404.)

Here then we prove by the brother-in-law of George Herrmann that in January or February, 1872, Mr. Rollwagen could not speak above a whisper; and we claim that he did not speak at all. The testimony which I am now considering is totally inconsistent with the evidence introduced by proponents afterwards; for if their subsequent witnesses told us the truth, then these witnesses falsified. The witnesses first introduced by them seemed far more candid than those afterwards put upon the stand. This witness substantially proves Mr. Rollwagen could not talk. He testified :

" Q. Did he speak as much as four words that you heard him pronounce during the whole time you were there on that occasion ?

" A. That I cannot say." (Fol. 3406.)

The witness will not say that Mr. Rollwagen in that

whisper pronounced as much as four words on that occasion. This witness states that he saw Mr. Rollwagen, in the Summer of 1872, in a carriage in which he was riding out with Lena; that they called at a store in a street which he named, and that while Lena was inside the building the witness went to the carriage, spoke to Mr. Rollwagen, and asked him how he did, and he says he thinks that Rollwagen uttered the word "so;" but in a subsequent portion of his evidence he says that he didn't know whether he did or not, and that if he did say anything, that was the only word. In respect to that, the witness might easily have been mistaken, because the gurgling noise of the throat described by the other witnesses might be interpreted by this witness to mean "so," and he testified :

"Q. When Mr. Rollwagen pronounced 'so,' in the Summer of 1872, did he pronounce it so that you could understand the word distinctly ?

"A. Not *distinctly*, but I could understand it." (Fol. 3420.)

When we have got Mr. Rollwagen down to the utterance of a single vowel, and that indistinctly, I think we have proven that his speech has disappeared for all the purposes of this case.

George Hay testified that he is a lithographer, and that he first knew Mr. Rollwagen in April or May, 1872; that he then saw him at his house in Ninth street, having gone there with Henry Herrmann; that Henry Herrmann introduced him to Mr. Rollwagen as Mr. Arbogast's son-in-law; that Mr. Rollwagen asked him how Mr. Arbogast was getting along; and that Mr. Rollwagen said, "Lena, get some wine." The witness says that he never thought again of this conversation until within a day or two of the time of giving his testimony; and that he never went with Henry Herrmann to any place before or since. His testimony, although of no intrinsic importance, is improbable upon its face. It is very unlikely that he should

go there with Herrmann on that one occasion, having no reason for going; and that he should remember a very unimportant conversation from that day to this. He shows what he thinks of proponents' side of the case. He testified :

" Q. Did you deem his [Rollwagen's] conduct to be rational or irrational ?

" A. No ; he was not rational.

" Q. Was his conduct rational or irrational at that time ?

" A. It was not rational.

" Q. Do you know what rational means ?

" A. It means that a man knows what he is doing." (Fol. 3451.)

I assumed that all the witnesses on the other side desired to say that Mr. Rollwagen was rational, but this witness adhered to his statement that he was not. I endeavoured to get him to fix the time of this conversation with decedent, and he said that he knew it was in 1872, because he printed some cards for a party up town, and he was calling there to get them, and met Mr. Herrmann. Subsequently he admitted that he did not print any cards for this or any other party that enabled him to fix the time; he tried to make an explanation of his first statement, but was not able to do so satisfactorily. He admitted that the cards had nothing to do with enabling him to fix the time. This was after I had made him admit that no such occurrence as testified to by him had actually taken place. He testified :

" Q. What had that to do with fixing the time of meeting Henry Herrmann to go to Mr. Rollwagen's ?

" A. It had nothing to do with it.

" Q. Nothing whatever ?

" A. Nothing at all—no.

" Q. You cannot fix the time by that at all, can you ?

" A. I cannot fix it—no." (Fols. 3506-7.)

This was after he had given that incident as the only event by which he was enabled to fix the time. For the

purpose of showing how readily he contradicted himself, I will read an extract from his testimony :

“ Q. Did he get out one word and then stop and wait before he got out another word ?

“ A. Yes, sir. * * *

“ Q. Did he speak a word, and then wait a little while before he could get out another word ?

“ A. No, sir.” (Fols. 3515-6.)

He says he was told by Mr. Rollwagen to tell Mr. Arbogast that he sent his regards to him, but he did not deliver the message. Here I undertook to examine him a little about the size of Mr. Rollwagen ; it was perfectly evident that he did not know his size at all. He testified :

“ Q. About what size man was he that you saw there, whom you supposed to be Mr. Rollwagen ?

“ A. About your size, I should judge.” (Fol. 3532.)

Then I asked him about his height ; he answered :

“ He may have been a man of your height.”

He said that he could not tell whether Rollwagen was $6\frac{1}{2}$ feet high.

“ Q. Cannot you tell any more of his height—can’t you state whether he was $6\frac{1}{2}$ feet high ?

“ A. I cannot remember that ; I paid no attention to his height at all. * * *

“ Q. Should you think that the man whom you supposed to be Mr. Rollwagen would weigh more than 250 pounds ?

“ A. Yes, sir, I should think so.

“ Q. Do you think he would weigh as much as 275 pounds ?

“ A. I cannot tell.” (Fols. 3532-4.)

If I was not pretty well off in that respect already, I ought to be greatly indebted to this witness, because he added about 8 inches to my height and 75 pounds to my weight. He stated that Mr. Rollwagen was about my weight, and that he could not tell but that he weighed 275 pounds, and that he was about my height.

The nearest he came to Rollwagen’s height was that

of six and a half feet. I don't know upon what principle the witness acted in giving me so much additional weight, instead of my opponent, Mr. Arnoux, unless it was upon the scriptural doctrine, "that to him that hath shall be given, and to him that hath not shall be taken away that which he hath." I feel profoundly grateful for one thing, that the additional seventy-five pounds which he conferred upon me he did not take from Mr. Arnoux, for if he had there would have been nothing left of him above his ankles, and then even Magdalena, the younger, would have out-weighed him.

I am no doctor, but if I had to prescribe for one lean, lank and cadaverous, who had wasted away until he could not tell the distinction between himself and a skeleton, my prescription would be that he should come into court and let one of Herrman's witnesses testify about him—swear at him. He would soon find his old bones robed with flesh; he would plump out and expand until he had attained the dignified rotundity of the typical alderman of ancient days.

William Bach testified that he was a painter; he formerly worked for Mr. William Werner. He states that he saw Mr. Rollwagen in the Spring of 1872; that at that time he, witness, worked with Mr. Schmidt and George Joeger; that he was then painting on some houses owned by Mr. Rollwagen, in Avenue A; that when he saw Mr. Rollwagen, Lena was present, and the usual stereotyped phraseology was put into the old gentleman's mouth, "Come, go for a drink." He says that at this time his voice was very rough:

"Spoke like a man that had got a cold and could not fetch the words out clear." (Fol. 3718.)

On his cross-examination he testified:

"Q. It was very hard work for him to get out words, was it not?"

"A. I guess so." (Fol. 3721.)

William Finkernagle testifies that, in 1871 or 1872, Mr. Rollwagen said that he would "build no more houses"

(fol. 3739). Here was an important fact stated. Mr. Rollwagen, as we may judge from the houses he possessed, twenty-five or more in number being owned by him at the time of his death, had for 20 or 30 years used his surplus funds in building. That was his business, and in that way his estate, from nothing at all, *accumulated to a large amount*. It was natural that Mr. Rollwagen should retire from active business, and occupy his attention still by continuing to build occasionally, as his funds from the large rentals of his estate accumulated from year to year; but in 1871 he tells this witness that he shall build no more, because *he is too old and sickly to be engaged in that business any longer*. This is the testimony of a witness for the proponents.

Frederick Young, a tailor, was called. He says that he had known Mr. Rollwagen for ten years, and that in June or July, 1872, he measured him for some clothes. He cannot say whether Rollwagen said anything on that occasion or not. He testified :

“ Q. What did you say to him ?

“ A. I cannot tell exactly what I did say.

“ Q. Did he reply to you ?

“ A. Yes, sir.

“ Q. What did he say to you, if anything, about the clothes ?

“ A. Well, I don't know that he said anything about the “ clothes.” (Fol. 3884.)

When we arrived at this stage of the case, I stopped cross-examining the witnesses on the other side, and this was one of the witnesses I did not cross-examine. I omitted the cross-examinations for the reason that I began to see that, although we had every prospect of longevity, all of us being in a sound and healthy condition, yet it was necessary to do some other business, and I saw no end of this case during the term for which your Honor was elected Surrogate, unless we made some additional effort to hurry through, and for that reason I did not cross-examine to any

considerable length the remaining witnesses called by proponents. Had I cross-examined this witness, I have no doubt I would have shown that Mr. Rollwagen did not utter one word as claimed.

Frederick C. Perry was the next witness called by proponents; he was our brilliant young Sophomore from Dartmouth College. He states that he saw Mr. Rollwagen in 1872, and that he talked with him "on subjects of general interest" (fol. 3893). What those subjects were he did not say; and what that young man would call "subjects of general interest" we are left entirely to conjecture. Afterwards he says that he saw him in the summer vacation in the first part of August, and that Mr. Rollwagen then talked. If this witness saw Mr. Rollwagen at that time, it was just after he (Rollwagen) had returned from Verona in the condition stated in the evidence of Mrs. Sheppard. We have proved by the best of all testimony that at that time Rollwagen could not say a word. Is it probable that Mr. Rollwagen, in his youthful glow and literary ardor to talk with this young Sophomore, would break out into discussions on subjects of general interest? or that he would then converse upon topics which never interested him in his best days; when all the hallowed associations clustering about Verona could not induce him to utter a word? What does this young man mean? Is his memory so treacherous, or does he state that which he does not believe to be true? He can take either horn of the dilemma; but that Mr. Rollwagen spoke to him at that time is incredible.

Nicholas Rose, who proves in some respects, as I shall show hereafter, an important witness to our side of the case, and who dealt heavy blows to proponents' case, was next called by them. He says that he was a coach-driver, and took deceased out riding in 1871, 1872, and 1873. During that period he was in the employ of Mr. Theiz. He says that Mr. Rollwagen "spoke weak, and could not pronounce his words plain" (fol. 3923); that the first words he said

which witness could understand were "Bleecker Street Bank" (fol. 3923). He got out that much, but could not say anything more. Whether that was in 1871, or 1872, I think does not appear. The witness says that in 1872 he could not understand Mr. Rollwagen. He states that the last time Mr. Rollwagen spoke to him was about six months before he moved into the new house, which would be in the latter part of 1872, and then the only words he did understand were "Dry Dock Bank" (fol. 3936). A part, if not all, of these conversations related to 1871.

Michael Kuhn, a machinist, was called. He says that he saw Mr. Rollwagen in 1872, but does not say that he heard him speak. They did not ask him that question, from which I infer he would have given an answer in the negative.

William Frederick Kaiser stated that he was a lager beer saloon keeper, and a tenant of Mr. Rollwagen. He says that in 1871 he had a conversation with Mr. Rollwagen about the lease, and that in 1872 Rollwagen came with Henry Herrmann and was introduced by him as his brother-in-law. In 1872 he went to Rollwagen's house and paid him the rent, and Mrs. Rollwagen took the money and counted it. I can see nothing in the testimony of this witness which helps the other side, and I need not dwell on it.

The next witness was *Peter Cook*, a lawyer, who testified somewhat at random. He stated that for ten years Mr. Rollwagen found it very difficult to talk. He dated his difficulty of speech further back than any other witness in this case on our side, unless it be Moser, and further back than any other witness on the other side, except Mrs. Miller. He states that he had a conversation with Mr. Rollwagen in 1872; at this time Mr. Cook says that he was on a veranda, some twenty feet above where Rollwagen sat, and that Mr. Rollwagen said something which he understood. At that time Mr. Rollwagen could not be understood by anybody. I have no doubt that Mr. Cook on this occa-

sion, when lifted in the air at that height, did say something to Mr. Rollwagen ; and he may think Mr. Rollwagen made a reply, but the fact is he could not have heard Mr. Rollwagen utter a single word, if he had attempted to speak, unless he was in a better talking condition than he had been during the previous five years.

Frederick Grassal was next called. He was an old acquaintance of Mr. Rollwagen, and had known him for thirty years. He says that he visited Mr. Rollwagen in 1872. He testified :

“ Q. Did he converse with you at that time ?

“ A. He did once in a while, but he talked kind of “hoarse.” (Fol. 4000.)

This was the last time that even this witness was able to understand anything that Mr. Rollwagen said, as I shall show in a subsequent part of my argument. This witness, although an honest one, was afflicted with a very defective memory, owing to certain peculiarities which were apparent in the evidence.

Charles F. Schmoll, a bank clerk in the Germania Bank, says that in 1872 he visited Mr. Rollwagen’s house to escort his wife home. He says that he talked with Mr. Rollwagen on general subjects. He and the young Sophomore during that year seemed to have limited their conversations to “general subjects,” from which I infer that Mr. Rollwagen said nothing on any particular subjects.

Christopher Bendenger was called by proponents. He keeps a wine and liquor store at No. 1 Avenue A. He says that in 1871 Mr. Rollwagen “spoke hard.” He testified :

“ Q. What was his voice in 1871 ?

“ A. Well, he could not speak except hard—he was “hoarse.” (Fol. 4069.)

Mr. Rollwagen had purchased wine of this witness in 1872. He says that Mr. Rollwagen did not pay for it, but

Mrs. Rollwagen did. "In 1872 he gave me directions, and he gave me the money she gave him" (fol. 4070). The directions undoubtedly were those given by Lena.

The next witness is *Henrietta Perry*. She testifies that she saw Mr. Rollwagen in the Lutheran Church some 28 or 29 years ago. Whether she spoke to him at that time is somewhat doubtful, but in 1869, after Lena went to live with Rollwagen, she visited them. This witness was born near the place of the nativity of Mr. Rollwagen. She says that she visited Lena and Mr. Rollwagen in 1872; and that Mr. Rollwagen's voice, in the latter part of 1872, began to get weaker—it was low. The testimony of this witness is in conflict with the greater part of the evidence introduced by the proponents. This testimony relates to the period of time when it is proved that Mr. Rollwagen could not talk at all; and by one of proponents' witnesses it is proved that, early in 1872, he had so lost his voice that he could not speak above a whisper; others of them say that he could not not speak at all during the precise period to which this lady—who, with all her graces, has a latitudinarian tongue—refers. She states that she was at Rollwagen's house on one Sunday in 1872, when Louis Rollwagen brought Mr. Pfluger there, and that Rollwagen said that he didn't wish Louis to bring Pfluger there any more. It may be that Mrs. Perry is mistaken, and that it was Lena who did not want Mr. Pfluger there, because he was a friend of one of the sons of Mr. Rollwagen. Lena never allowed any of Mr. Rollwagen's children or his grandchildren, or their friends (with the solitary exceptions of Barbara Sheppard and her mother), to see Mr. Rollwagen *except in her presence*. She imbued Mrs. Perry with the belief that it was Mr. Rollwagen who did not want Mr. Pfluger there. Mrs. Perry is simply the mouthpiece of Lena in respect to this part of her evidence.

The other witnesses for proponents—John C. Hock, Ernest Ohl, George Schmidt, Amelia Schmoll, and Mar-

garet Boese—all testify that they heard Mr. Rollwagen talk more or less in 1872. These, with the other witnesses who testified in the same way, if honest, simply confounded Lena's interpretation with what they afterwards thought that Rollwagen said.

But when you come to real swearing, when you wish swearing done with Herculean vigor, give me a woman, provided she is "an intimate but not a bosom friend" of Lena Herrmann. Mrs. Schmoll says that in 1872 she was at Rollwagen's with her baby five months old, when the bell rang, and Lena asked her to open the door. She testifies either to a physical impossibility or to a miracle; for she swears that Rollwagen, with his palsied arm, took this baby of hers, five months old, and held it upon his lap until she went to the door and returned. In order that I may do her no injustice, I will read an extract from her testimony:

"Mr. Rollwagen put out his two hands and I laid the baby on his lap, and I went out and opened the door, . . . and came back, and he was still holding the baby. . . .

"Q. What did you say to him?

"A. I said this: 'Mr. Rollwagen, it is dangerous to hold a baby;' I said 'it is catching; you may have one to hold of your own.'

"Q. What did he say?

"A. He said, 'That's all right.'

"Q. Did he laugh?

"A. Yes, sir—heartily, very heartily." (Fols. 4370-73.)

I am inclined to think this must have been a miracle, because I don't want to impute any lack of integrity to this witness unless duty to my client absolutely demands it. And yet, if this statement were true, what a wonderful woman this must be! Here was a paralytic man, who had been so for two years—he had been so since 1871—and yet this woman exercised such a power over him with reference to subsequent events, that she tells you her solution of a most remarkable problem. What a wonderful

power Mrs. Schmoll and her baby must possess! If they were borne through the sparsely settled portions of our country, they would teem with population. Then, indeed, would the waste places of our land be built up, and the wilderness blossom as the rose. If the presence of Mrs. Schmoll and her little cherub would cure an imbecile man of his imbecility, an impotent man of his impotency, a paralytic of his paralysis—would cure an old man of his age—would rehabilitate him with the powers of youth, and cause such a man to become a father,—what would be the magical effect upon the other sex! Sterility would cease. Married ladies who had worn the matrimonial yoke and remained childless until they reached the age of threescore and ten, and even fourscore years, would soon be blessed with suckling babes, and in point of fecundity take leading rank among the mothers in Israel.

You cannot reconcile the testimony of this witness with the medical facts proven in the case. The idea that this lady, this friend of Lena, for eleven years her companion, her intimate companion, would witness such a scene, that she would risk her offspring in the palsied arm of a paralytic old man, and that he could hold that child for five or ten minutes with his palsied arm! The testimony only shows the zeal of this witness in swearing for her friend of eleven years' standing.

I will now proceed to discuss the physical condition of decedent during the year 1873.

In 1871, 1872, and 1873, all the business of Mr. Rollwagen's estate was done in his name. In addition to the ordinary business, [collecting rents and taking care of the real estate,] in the year 1873 a new building was erected. For two years before his death Lena assumed to transact most of his business for him. After George D. Rollwagen went to California, which was early in the Fall of 1872, Lena and Henry Herrmann acted in all matters pertaining

to Mr. Rollwagen's estate. In the Spring of 1873 it was so managed that the former collector and agent of Mr. Rollwagen was dismissed, and Henry Herrmann took his place. When Lena and Henry Herrmann had thus acquired exclusive possession of Mr. Rollwagen, both in respect to his person and estate, from some reason or other they determined to build another house. Rollwagen had funds in bank sufficient for that purpose. In connection with the building of this house, contracts were made in the name of Rollwagen. All the persons who had any connection with the erection of that building called to see Mr. Rollwagen, and in *form* addressed him on the subject. Although everything was done in Mr. Rollwagen's name, and *nominally* by him, yet the truth of the matter was simply this: Lena and Henry Herrmann did the business in his name. It cannot be argued, even with plausibility, that the fact that this business was done *nominally* by Mr. Rollwagen affords any proof either of his mental capacity or of his power to communicate his ideas by speech or otherwise. A careful review of the evidence will demonstrate the fact that in these matters of business Rollwagen, in fact, took no part whatever.

As we approach the time of the execution of his alleged will and codicil, his physical condition becomes more important. The first witness that speaks upon that subject, and to whose testimony I invite your attention, is *Barbara Sheppard*. She and her mother were written to by Lena early in February. They were told in the letter that if they ever expected to see Mr. Rollwagen again alive, they should come and visit him; that in all probability he would never again be able to visit them. He never did again visit them. Believing from the tenor of that letter that he was at death's door, his sister and niece came here to see him.

Upon her arrival, Mrs. Sheppard noticed that Mr. Rollwagen was much worse than when she last saw him. She

says "he was very feeble, and had *failed greatly since I saw him in 1872.*"

"Q. State in what you noticed that he had failed.

"A. In almost every respect. It seemed to me that he "could not help himself as much as he could when in my "house in 1872." (Fols. 2729, 2730.)

During the week Mrs. Sheppard and her mother were there, they were with Mr. Rollwagen nearly all the time (fol. 2730). During the whole period of time they were there, he never uttered one word or syllable which could be understood by any human being, as will appear by the following extract from her testimony :

"Q. During the whole time when you and your mother, "or anybody in your presence, tried to talk with him, did "he say or pronounce a word or syllable ?

"A. No, sir. (Fol. 2731.) * * *

"Q. Did Louis and Fred, as well as your mother and "yourself, try to talk with Mr. Rollwagen during that "time ?

"A. Yes, sir.

"Q. Frequently ?

"A. Yes, sir. * * *

"Q. During that time did she [Lena] profess to interpret "to you and your mother what he said ?

"A. Yes, sir." (Fols. 2732, 2733.)

Mrs. Sheppard states that other persons called to see Mr. Rollwagen ; and among those who called were the Brown- ing children, who were there frequently.

"Q. I understand you that, during the whole time you "and your mother were there, he didn't pronounce a word "or syllable in your hearing that you could understand ?

"A. No, sir.

"Q. State whether you sat with him a good deal while "he was in bed and unable to get up ?

"A. Yes, sir ; I generally reclined on the side of the bed "and sat there with him.

"Q. State whether you held his hand in yours during the "time ?

"A. Yes, sir, I did, every time I sat on the bed. I think most of the time, if not all, I had hold of his hand.

"Q. You took his hand in yours?

"A. Yes, sir; I reached for his hand.

"Q. During that stay was your mother with him a great deal.

"A. Yes, sir." (Fols. 2734-2735.)

Mrs. Sheppard and her mother during their stay bestowed upon him every attention which kindness or affection could prompt or suggest. Their whole time was taken up in their attentions to the decedent. They had the most ample opportunities to observe his condition. The testimony of Mrs. Sheppard upon this point is of the greatest importance. She gives the result of not only her own observation, but of that of her mother. She gives a very accurate and faithful account of the feeble and helpless condition of Mr. Rollwagen at this time. She states, furthermore, that during that whole time he was fed like a child, and that not a morsel of food or a drop of liquid entered his lips except by the agency of Lena, as will appear by the following extract from her testimony:

"Q. During all that time that you were there, how did he (Rollwagen) eat or drink?

"A. With a spoon, fed like a child.

"Q. Who fed him?

"A. Lena.

"Q. He, as far as you know, ate or drank nothing except as he was fed by Lena?

"A. Yes, sir." (Fols. 2735-2736.)

She treated him like a child. He was unable to control the calls of nature. He was utterly helpless in every respect. During this entire period Rollwagen was so weak that he was unable even to sit up, except for a short time.

Mrs. Sheppard testifies on this subject as follows:

"Q. During all the time you were there did Mr. Rollwagen sit up any?

"A. He sat up to have his bed made, and sometimes he would sit up for half an hour.

"Q. To have his bed made?

"A. Yes, sir.

"Q. Did he, as a general thing, sit up longer than to have his bed made?

"A. Sometimes a little longer.

"Q. About how much longer?

"A. I cannot tell you the exact time, but a short time.

"Q. Give an idea, whether by minutes or hours?

"A. It might possibly be over a half hour, but I don't know.

"Q. Something like that?

"A. Yes, sir.

"Q. Not any great length of time?

"A. No, sir.

"Q. When your mother was talking to him, was he unable to sit up?

"A. He sat up in bed, or rather he inclined on pillows raised up in bed." (Fols. 2736-7.)

At a subsequent period Lena told this witness that for a few months before Mr. Rollwagen's death she had to lift him around; and that he was so heavy that it seemed as if she would break her back in moving him (fols. 2749-2750). So that, according to Lena's own admissions, which are proven, Mr. Rollwagen was utterly helpless until the day of his death. There is no conflict of testimony on this point. To be sure, some of the witnesses for proponents claim that he talked during this period; but I will examine their evidence presently.

William P. Mitchell states that in March he went to Mr. Rollwagen's house; that he took his hand; that Mr. Rollwagen did nothing—did not move his hand or fingers; he did not say anything, or make any noise; he remained in a stooping position all the time that witness was there.

Frederick Geissenheimer says that in 1873, before Mr. Rollwagen moved into the new house, he was sent for; he thinks it was about the last of March or sometime in April.

It appears that the person building, or about to build, next door to Rollwagen, served him with a notice to shore up his walls, and that Mr. Geissenheimer was sent for to give advice on the subject. He went to see Mr. Rollwagen, and had an interview with him; Lena interpreted as usual. He testified as follows:

"Q. State whether she repeated what you said, or the substance of it?

"A. She did.

"Q. Did he do anything, or what did he do?

"A. He would mumble and she would then ask some other question.

"Q. State whether by mumbling you mean a noise?

"A. 'M, 'm, 'm [accompanying the sound with a movement of the head]; I cannot give it exactly. * * * *

"Q. Then as she repeated to him the substance of what you said, you say he nodded his head and made the sound of which you have described? •

"A. Yes, sir.

"Q. Did he say anything more than that in your presence or to your knowledge?

"A. Yes; I spoke directly to him, and then he would mumble and she would translate that.

"Q. Professed to translate it?

"A. She professed to translate. I could not understand what he said, and she professed to state it." (Fols. 1096-7.)

* * * * *

"Q. Did you or could you understand anything said by him?

"A. Nothing said by him.

"Q. Did he say a word which you could hear or understand?

"A. Not that I could recognize as a word." (Fols. 1096 to 1098.)

Witness says he sat within a foot of Mr. Rollwagen, so that, if he had pronounced any word or syllable, the witness could have heard and understood him (fol. 1098). Mr. Rollwagen said nothing during the entire transaction of the business. As far as we can judge from the testi-

mony of this witness, he was utterly unable to utter a word or syllable.

Charles Stephan, the barber, says that in 1873 he was sent for to come and pay the interest on his note for \$500. In January he went to see Mr. Rollwagen, and endeavored to talk with him. He testified as follows :

“ Q. Did you speak to him ?

“ A. I went to speak to him.

“ Q. What did you say ?

“ A. Just the same as always—‘ How do you do, Mr. Rollwagen ? ’ Then he commenced with his ‘ Ghagh, ‘ ghagh, ‘ ghagh ’ [accompanying the sound with a nod].

* * * * *

“ I told him I wanted to pay my interest. . . . I paid the interest to Mrs. Rollwagen.” (Fols. 1282-3.)

He says that Lena told him that Rollwagen was building, and wanted the money ; that he told him at what time he would pay it, and Lena told Rollwagen what he said. The witness states that during the entire interview, although he had known him for twenty years, and known him intimately, Mr. Rollwagen said nothing. He simply went through the motions that he had made on previous occasions.

In April, 1873, *Michael Hahn*, Secretary of the Teutonia Savings Bank, who had known Rollwagen for twenty years, called to see him in company with Louis Rollwagen. The witness states :

“ Lena came in ; Louis introduced me to Rollwagen. Rollwagen made a noise unintelligible to me. Louis spoke to him about a party wall ; Rollwagen did not make any noise.”

The witness testified as follows. Louis Rollwagen spoke to his father :

“ Q. What did he say ?

“ A. He said ‘ This is Mr. Hahn—don’t you know him ? ’

“ Q. As he said that, did he look at his father ?

“ A. Yes, sir.

" Q. What did the father do, if anything ?

" A. He didn't say anything.

" Q. Did his father speak ?

" A. No, sir.

" Q. Did he make any noise ?

" A. He made a sort of a noise that was unintelligible to me.

" Q. Did he look at you ?

" A. Yes, sir." (Fol. 2057.)

He sat in an arm-chair, his face was vacant, his lips parted, his tongue protruding. He testified as follows :

" Q. After Louis said to his father, 'This is Mr. Hahn, don't you know him ?' describe, if you can, how his father sat and what he did, if anything ; as to whether his lips were open or shut, or how his tongue was ?

" A. About this way [showing the lips open].

" Q. Describe the appearance of Mr. Rollwagen's face ?

" A. His lips were somewhat parted, with his tongue a little protruding.

" Q. His face—how did that appear ?

" A. It appeared kind of vacant." (Fol. 2059.)

Q. When Louis spoke to him he at intervals made the noise already described. Witness could not understand anything that Rollwagen said. He testifies :

" Q. While Louis talked with him (deceased) did you notice whether Mr. Rollwagen the deceased made any noise with his mouth or throat ?

" A. There seemed to be some kind of noise coming from him.

" Q. Some kind of noise coming from his throat ?

" A. Yes, sir.

" Q. But nothing that you could understand ?

" A. Nothing that I could understand." (Fols. 2060-61.

* * * *

" Q. During all that time did Mr. Rollwagen the deceased say a word or syllable which you could understand ?

" A. No, sir." (Fol. 2062.)

In April, *Catharine Monninger*, the mother-in-law of Louis, went with her daughter to see Mr. Rollwagen. She says he sat "in a big arm chair, and he had a little stool

under his feet." She states that she spoke to him, but he said nothing. She testified as follows :

" Q. You spoke to him ?

" A. Yes, sir.

" Q. What did you say ?

" A. I said, ' How do you do, Mr. Rollwagen ?

" Q. Did he do or say anything ?

" A. Nothing at all ; he had a kind of *staring look*. *He looked at me with big eyes and his mouth open, and his tongue rested on his lips or teeth like ; you could see his tongue resting on his lips.*

" Q. He didn't say anything ?

" A. Nothing at all ; he didn't say anything at all." (Fol. 2295.)

The witness says that her daughter, the wife of Louis Rollwagen, went with her to see the decedent, and that she, Mrs. Rollwagen, said to him, " Father, this is mother—this is my mother."

" Q. When she said ' Father, this is mother,' did he do anything ?

" A. Nothing at all. * * * (Fol. 2297.)

The following extract from her evidence in this connection is important :

" Q. Did you offer to shake hands with him at that time ?

" A. He had his hand hanging like—down—and I caught hold of his hand, but he didn't move his arm.

" Q. When you caught hold of his hand, did he move his hand or fingers at all ?

" A. Nothing at all.

" Q. No motion whatever ?

" A. No, sir ; his hand felt *as though it was a dead hand*.

" Q. Do you remember whether you had hold of his right hand or left hand ?

" A. It was his right hand.

" Q. As you say, it felt like the hand of a corpse ?

" A. Yes, *like a dead hand*." (Fols. 2298-9.)

The witness says that Lena was present during this interview with Mr. Rollwagen.

We now approach the period of time which embraces most of the business transactions connected with Rollwagen's estate during the year 1873. The witnesses whom we have called have been either his intimate friends, or those who were friends of his family or of his children, or those who had business with him. If Rollwagen were capable of speaking at all, he would certainly have spoken to those with whom he had important business relations.

William H. Sackett says that he negotiated the sale of the house No. 312 Ninth street, in which Mr. Rollwagen died. He was the brother-in-law of the owner of that building. He had frequent conversations with Lena, but had never seen Rollwagen until the time he called there. He tried repeatedly to talk with Rollwagen, but he never uttered a word or syllable which the witness could understand. When he spoke to Mr. Rollwagen about the house, and about the price, Lena would whisper to him. She put her lips close to his ear. On this occasion she did not pretend to read from his lips; she put her lips close to his ear, and put her ear close to his lips. He sat with his mouth open. They seemed to talk—that is, Lena talked, and Rollwagen seemed to make a noise. This witness testified:

“Q. When you were introduced to him, did he make a noise with his lips?

“A. Or with his throat—a guttural sound.

“Q. A sound above a whisper?

“A. Just.

“Q. Do you think you could imitate that noise?

“A. Anybody, most, would know what a guttural sound was; it was a noise.

“Q. Was it a sound like this, eh, eh [making an obscure sound from the throat combined of the short vowel ‘e,’ and French nasal ‘n’]?

“A. Yes, sir, that is just about it.” (Fols. 2538-9.)

It will be remembered that the testimony shows that, for four or five years or more before his death, Mr. Rollwagen was partially deaf—quite hard of hearing. On this occasion, it would seem that Lena desired to have it appear

that she, in the presence of Mr. Sackett, was carrying on confidential conversations with Rollwagen, which Mr. Sackett could not hear or understand. Lena whispered on this occasion. Sackett testified :

" Q. When you mentioned the price did Mrs. Rollwagen say anything ?

" A. Yes, she would whisper to him, or talk to him.

" Q. Whisper or talk to him ?

" A. Yes, sir.

" Q. Did you notice when she whispered to him whether she put her lips to his ear, or anything of that kind ?

" A. Very close.

" Q. When she whispered or talked in that way to him, did she say anything to you as to what he said ?

" A. There was a general conversation about it. (Fol. 2541.) * * * * *

" Q. During any of these interviews did she (Mrs. Rollwagen) put her ear to the mouth of Mr. Rollwagen ?

" A. Yes, sir.

" Q. And when she talked to him, state whether it was done in a whisper, or above a whisper, that Mrs. Rollwagen spake ?

" A. It was generally above. * * *

" Q. After she put her lips to his mouth, or ear to his mouth rather, did she say that Mr. Rollwagen said thus and so ?

" A. Yes, sir.

" Q. And during your various interviews, did she tell you what Mr. Rollwagen said ?

" A. Yes, sir.

" Q. Or what she claimed that he said ?

" A. Yes, sir." (Fols. 2548-9.)

Finally an agreement was made to take the house. Lena, with Mr. Herrman, conducted the whole business. The witness says that he saw Lena feeding Mr. Rollwagen with a spoon; he observed this in the new house about a month before Rollwagen died. He never saw Rollwagen help himself at all in the way of eating. When he signed the contract for the purchase of the house, Lena guided

his hand. He did not move his fingers without her assistance.

We now come down to the month of May. *Henry Werner*, a painter, who had known Rollwagen for the last ten years, and had a great deal of business with him during that time, saw him in the months of April or May (fols. 2398 to 2413). He went to see him about painting his house. He saw Rollwagen and Lena. He spoke to Rollwagen, who made some movement with his lips, but did not speak. Mrs. Rollwagen did all the interpreting. He testified that he spoke to Rollwagen, and said :

“ ‘ How do you do, papa ? ’ and shook hands with him. ‘ He had his hands lying on his lap, and I took hold of his hand. ”

“ Q. Did he make any noise when you said ‘ How do you do, papa ? ’ ”

“ A. He tried to make some movement ; he made some movement of the lips, but he didn’t speak anything. ”

“ Q. His lips moved ? ”

“ A. Yes, sir. ”

“ Q. Did she say anything ? ”

“ A. She told me that papa wants her to get the key and ‘ show me the house. ’ (Fols. 2414–5.) ”

This is a fair specimen of the manner in which Lena professed to interpret the thoughts and wishes of decedent. This witness proves that the decedent had no power whatever with his right hand. This he discovered on attempting to shake hands with him. He testified :

“ Q. As you took hold of his hand, when you first went in, did he *grasp your hand at all* ? ”

“ A. Well, *no, sir* ; he let his hand lay there still. ”

“ Q. Was it the right or the left hand that you took hold of ? ”

“ A. It was his right hand. ” (Fol. 2421.)

A few days afterwards the witness again called to see Mr. Rollwagen. The witness says he attempted to shake hands with him ; that is, he took hold of his right hand, “ it was lying about the same way, he had it lying on his lap. ”

He says the decedent did not move his hand or fingers at all. (Fols. 2423-4.)

The witness says that he offered to do the painting for the new house for \$1,100. Lena said the old gentleman was willing to give a thousand dollars. The witness refused to take the job for that price. Rollwagen said nothing during this whole time. Werner says Rollwagen made a noise which he could not understand. This witness, like all the others who had business with Rollwagen, went through the form of addressing him, although they were aware that he could not speak, that he could say nothing in response. The witness asked Mr. Rollwagen to think the matter over, and stated that he would return in a day or two. He testified :

“ Q. When you said, ‘ Papa, think over that matter a day “ or two,’ did Mr. Rollwagen make any noise or say anything ?

“ A. No, sir.

“ Q. Or move his lips ?

“ A. No, sir ; he looked at me, that was all.

“ Q. Then did you bid him good-bye ?

“ A. Yes, sir.

“ Q. And left ?

“ A. Yes.

“ Q. When you bid him good-bye, did he make a noise ?

“ A. No, sir.

“ Q. Did he say anything ?

“ A. No, sir ; he moved his lips, but he did not say anything.” (Fols. 2428-9.)

The witness called a few days afterwards, and Lena told him that the job had been given to some one else, as the old gentleman thought he did not care for it. During all these interviews the decedent said nothing which Mr. Werner could understand. He testified :

“ Q. Did you hear him say anything ? Did you hear him “ pronounce any word that you could understand ?

“ A. No, sir.

“ Q. He pronounced no word ?

“ A. He pronounced no word.

" Q. He pronounced no word that you could understand ?

" A. No, sir.

" Q. Did you hear him make any noise then ?

" A. Yes, sir; he made a kind of a noise, a kind of a little noise.

" Q. A noise with his throat ?

" A. He moved his lips in speaking to Lena.

" Q. Could you hear any noise that he made with his throat ?

" A. Yes." (Fols. 2430-1.)

At the time Lena told the witness that Rollwagen thought he did not care for the work, Rollwagen could not have said this, and she had no opportunity to hear it had he even attempted to speak it. Lena attempted to tell Werner what Mr. Rollwagen said. She said to him "that the old man means that he had got somebody else to do it a couple of hundred dollars less" than the offer of the witness.

" Q. When he made this noise, and Lena told you this, about what kind of a noise was it; can you imitate it ?

" A. Well, I cannot.

" Q. How long did he continue to make that noise to Lena before she told you that ?

" A. He didn't talk long.

" Q. A second ?

" A. Yes, sir, about that." (Fol. 2433.)

This witness had been in the habit of doing jobs of this kind for Rollwagen during the whole ten years that he had been acquainted with him (fol. 2434).

He was a countryman of Rollwagen, and had he been able to talk, or in any way communicate his ideas, this witness could have understood him.

David P. Arnold testified that he saw Rollwagen in the latter part of the Spring and through the Summer of 1873. He saw him several times a week. He says :

" I noticed he was failing very fast. * * * Anybody would notice it who noticed at all, and had eyes in his head " (fol. 2496).

The witness states that he always spoke to him when he saw him; but that Rollwagen made no response. He says he noticed "that his eyes were growing dimmer. * * * He looked staring all the time." The witness states that whenever he spoke to Rollwagen he did not make any answer, but "was always looking right straight at him" (fols. 2497-8). He testified:

"Q. You are sure that he said nothing—pronounced no word or syllable that you could understand?

"A. I could not understand anything—nothing whatever" (fol. 2499).

The witness states he continued to observe Mr. Rollwagen until about the time he moved into the new house (fol. 2500), which was about the middle of June. The witness states that at these interviews, when he tried to talk with Mr. Rollwagen, Lena was always present (fol. 2501). The witness says he saw Mr. Rollwagen two days before his death; that he was lying in bed, on his back, and with his mouth open. At this time he states that Mr. Rollwagen did not know him, although Lena, who acted her part to the last, asserted that he did. The motive which prompted her is apparent. On this occasion Louis Rollwagen was present. The witness testified:

"Q. What did you say?

"A. I said to Mr. Rollwagen, 'How do you do, boss?'"

"He made no response whatever.

"Q. Did you say anything to Louis?

"A. I did.

"Q. What did you say?

"A. I said, 'Louis, your father don't know me.'

"Q. Did Lena say anything?

"A. She spoke up—'Yes; he does know you.'

"Q. What did you say?

"A. I said 'He does not.'

"Q. Go on and state what occurred after that?

"A. Then I looked at him, and Mrs. Miller gave him a teaspoonfull of brandy, I should think it was, or something to wet his lips.

"Q. Some liquid ?

"A. Yes. His lips were then shut tight ; he would not "take it " (fols. 2503-4).

William P. Mitchell testified that he went to see Mr. Rollwagen in May ; that Frederick spoke to Mr. Rollwagen about an architect, and that he made a sound from his throat. Frederick said that he could not understand his father at all. Lena put her ear to Mr. Rollwagen's mouth, and then spoke to Fred. in German. Here she pretends to interpret by putting her ear to his mouth. He uttered no word or syllable that witness could understand (fols. 1369 to 1372).

Frederick Pfluger also saw decedent in May. He and Louis went there together. He saw Mr. Rollwagen sitting in the front area. He bowed to him, but Rollwagen did not move. He looked more feeble than ever. (Fols. 1605 to 1611.)

Julius Feldheim also called there in May, and saw Mr. Rollwagen sitting outside on the stoop ; he did not speak.

William Challier, who knew Rollwagen well for six years, was the carpenter who did the repairing to the new house. He was at Rollwagen's a number of days ; Rollwagen said nothing which he could not understand. He got all his instructions from Mrs. Rollwagen. He was there for five weeks continuously, and during that time saw Rollwagen frequently, nearly every day ; is sure that he saw him as many as twenty times ; but that on no occasion did Mr. Rollwagen ever utter a word, although witness frequently tried to talk with him. Mrs. Rollwagen did all the business.

Lena also professed to interpret to others what she claimed Rollwagen said. The witness testified :

"Q. Did she put her ear to Mr. Rollwagen's lips, did you notice ?

"A. When he spoke to her she held over to him, and he

"made 'p'f, p'f, p'f, p'f' [a sound made with rapid motion of the lips and the emission of breath]. * * *

"Q. Did she put her ear to Mr. Rollwagen's lips, did you notice?

"A. She did not put her ear to his lips—close to them—but held her ear towards them.

"Q. When Lena said that, did Mr. Rollwagen state something?

"A. Mr. Rollwagen's lips moved.

"Q. That you saw?

"A. Yes, he said 'p'f, p'f, p'f.'

"Q. During these five weeks did Mr. Rollwagen say any word or syllable that you could understand? Did he or not?

"A. No." (Fols. 1925-6.)

The other side certainly will not deny that this witness possessed candor and frankness. At a subsequent stage of the trial proponents put him on the stand as their witness to prove one or two facts. They have fully endorsed him as an honest and candid witness.

Bernard Schaaf, a mason who had known Mr. Rollwagen for fifteen or sixteen years, was applied to in relation to the mason work for a new building which Rollwagen was about erecting. He called on Rollwagen the 4th of June, 1873. He endeavored to talk to Mr. Rollwagen, but the latter said nothing which he could understand. The witness testified as follows:

"Q. Tell what you said first.

"A. * * * 'I am now here, Mr. Rollwagen; you wanted to see me;' he makes 'ehn, ehn, ehn, ehn' [a sound several times repeated, combined with the short sound of the vowel *e*, the nasal *n* of the French; pronunciation with a nod of the head].

"Q. Did you look at Mr. Rollwagen when he said that?

"A. Certainly. . . .

"Q. After you said that and he made that noise, what next was done?

"A. Then Mr. Rollwagen's wife told me that he wants to know my name, that he did not know it before. Then I

"said, 'Mr. Rollwagen, you know your building in Norfolk street that you owned; I was the foreman. I am Mr. 'Schaaf;' and he makes 'ehn, ehn, ehn, ehn' [making the same sound, and accompanying it with a nod of the head].

"Q. He moved his hand?

"A. He moved not his hand at that time. He moved his head.

"Q. How was his tongue in his mouth—just show?

"A. He makes this way, 'ehn, ehn, ehn' [making the same sound with his mouth, and his tongue slightly protruding.] (Folios 1737 to 1739.)

After this, the witness says Lena spoke to Rollwagen :

"Q. She spoke to him?

"A. The wife looked to Mr. Rollwagen.

"Q. What then?

"A. Then if he spoke to her I don't know what he said.

"Q. You did not hear him say anything to her, or do you know anything he said?

"A. He makes 'ehn, ehn, ehn, ehn' [accompanying the sound with a nod]. * * *

"Q. Did you hear him say any word or words?

"A. No.

"Q. Nothing that you could understand?

"A. I could not understand any words. * * *

"Q. If he (Rollwagen) pronounced a word, say so; but if he made a noise, say so. My question is—When she came near him what did he do with reference to Mrs. Rollwagen?

"A. He makes 'ehn, ehn, ehn, ehn,' [accompanying the sound with a nod].

"Q. After he made that noise, what next was done?

"A. Then Mrs. Rollwagen went for a bottle of wine." (Folios 1741 to 1743.)

Subsequently, the terms of doing the mason work having been agreed upon, Boekell, the architect, read the contract aloud. The witness testified:

"Q. Before he (Boekell) read the contract, did he say anything to Rollwagen?

"A. No. He spoke first to me to know what payments I wanted to take that building. I said in *three* payments.

"Mrs. Rollwagen said to Mr. Rollwagen, 'He wants three payments.' He makes 'ehn, ehn, ehn.' (Folio 1745.)

* * * * *

"Q. What next was said or done ?

"A. Then Mrs. Rollwagen said he would not do that ; "that he would have one payment when the job was "finished."

The fact that Lena desired but one payment instead of three, in this connection, has peculiar significance. She knew that Rollwagen was physically unable to sign his name to checks. We shall show hereafter that bank checks purporting to be signed by Rollwagen were, in fact, signed by Lena, and paid away, without informing the parties who received them ; that they did not bear the genuine signature of Mr. Rollwagen. I shall show hereafter that this was a part of the general scheme. Rollwagen's signature was imitated by Lena. She did not want to sign his name to checks any oftener than was absolutely necessary for her purposes. Hence the motive on her part in urging that there should be only *one* payment. Rollwagen had a large amount of money in the bank, and it could make no possible difference to him, or to his estate, whether the mason work was paid for in one or in several payments. After Lena discovered that Mr. Schaaf would not do the work unless he could receive his compensation in several payments, she yielded at once. On this subject the witness testified :

"Q. What next ?

"A. Mr. Rollwagen's wife said that he will be satisfied "with two payments." (Folio 1747.)

The witness consented to take the job, and agreed that his part of the work should be completed within four months. After that the contract was signed. As Rollwagen was not able to sign his name, Henry Herrmann signed it for him. The witness testified :

"Q. What did Mr. Boekell say ? give his words. Repeat, "if you can, his words ?

"A. I can say what Mr. Boekell said to Mr. Rollwagen.

“ ‘Will it give you satisfaction if Mr. Herrmann writes his name for you ?’—and he makes ‘ehn, ehn, ehn, ehn’ [accompanying the sound with a nod].

“ Q. What did he do ?

“ A. He (Rollwagen) makes ‘ehn, ehn, ehn, ehn’ [accompanying the sound with a nod].

“ Q. Did he move his head when he said so ?

“ A. Yes.

“ Q. He moved his head forward and made that noise ?

“ A. Yes ; he was sitting *that* way in the chair [showing a position sitting erect in the chair, with his head leaning back, mouth open, and hands resting upon his legs].

“ Q. Describe how he was sitting in the chair when he made that noise ?

“ A. He sat so [showing the position just described], and he makes ‘wehn, wehn, wehn, wehn, wehn’ [making a succession of sounds like the others, but preceded by a *w*].” (Fols. 1749 to 1751.)

After this the witness signed his name to the contract. During this entire interview Rollwagen did not say or pronounce a word or syllable. The witness testified :

“ Q. During all the time you were there Mr. Rollwagen said nothing, as I understand you, when he made the noise you have described ?

“ A. He makes some noise many times, but I could not understand what he said.” (Fol. 1753.)

Charles Schwartz is the next witness to whose evidence I will call your attention. Mr. Schwartz was a member of the firm of Schwartz & Lehman, carpenters and builders. He had known Mr. Rollwagen about eighteen years. Early in June, 1873, he called at Rollwagen’s residence for the purpose of getting the plans and specifications for the carpenter work on the building which Rollwagen was erecting. He was sent by Mr. Boekell, the architect. Rollwagen did not do or say anything during this interview. Lena told him the plans were not then ready but would be soon, and he could have them if he would call for them in a few days. On the 21st of June he called again ; when he arrived there he found Mr. Boekell, Mr. and Mrs. Rollwagen, Mr.

Herrmann, and the draughtsman. The witness spoke to Mr. Rollwagen, but he made no reply. Mr. Boekell stated that the papers were ready; the contract was then read by Mr. Boekell. The witness testified :

“Q. After he read the contract through what next ?

“A. He laid it on the table and then he said : ‘ It is now ready to sign.’ He then addressed his conversation to Mr. Rollwagen, who was sitting at the head of the table.

“Q. Repeat his words ?

“A. He (Boekell) said, ‘ Mr. Rollwagen, do you give this man authority to sign for you ?’

“Q. What man ?

“A. Mr. Herrmann.

“Q. Henry Herrmann ?

“A. Yes; he was sitting right next to him. He said, ‘ Do you give this man authority to sign for you ?’

“Q. What did Mr. Rollwagen do ?

“A. Mr. Rollwagen was sitting so [showing the hands resting on the arms of the chair], and he moved twice with his head.

“Q. Did he make any sound with his voice ?

“A. Not at that time. * * *

“Q. Then what next was done ?

“A. That contract was given to him to sign, and Mr. Herrmann signed, and I signed, and Mr. Boekell signed “as a witness.” (Fols. 1856 to 1858.)

At this time Lena and Herrmann knew that Rollwagen was unable to write his name, and for this reason Herrmann signed for him. Between the time the witness called in the early part of June and the time this contract was signed, namely, the 21st of June, *the will had been executed*. The execution of the will took place on the 17th of June, 1873, but four days before the signing of this contract. On these occasions in June, when Schwartz saw Mr. Rollwagen, he was unable to speak. *On the 17th of June, when the will was executed, Mr. Bellesheim, the lawyer who drew it, and Dr. Goulden, both subscribing witnesses to the will, testified that on that occasion Rollwagen did not say a word or syllable which either of them could understand. He simply made a peculiar noise in his throat, which the witnesses through-*

out the case have described differently, some giving one description of it and others another.

Nicholas Graham, who was in the employ of Anderson, the carpet man, in the Bowery, put down the carpets for the new house in June. He saw Mr. Rollwagen at least eight or ten times. He noticed that he had changed considerably since he had previously seen him. Rollwagen did not say anything whatever that was intelligible. He made the noise in his throat described by the other witnesses. The witness testified :

“ Q. Did he make any noise with his throat when you spoke to him ?

“ A. He did. * * *

“ Q. When you spoke to him did he make any motion with his head ?

“ A. He made a motion that way with his head [showing a movement in his head from shoulder to shoulder].

“ Q. When you spoke to him, did he generally make a motion sideways with his head ?

“ A. I have not even spoken to him.

“ Q. I say, whenever you did ?

“ A. He did the last time. *He could not speak.*

“ Q. When you went there and noticed him—when you were taking up the oil-cloth ?

“ A. He never spoke at all.

“ Q. Did you say to him, ‘How do you do, Mr. Rollwagen ?’ or anything of that kind ?

“ A. I did. I said, ‘How are you, Mr. Rollwagen ? Are you feeling any better ?’ That is the time he——

“ Q. Moved his head ?

“ A. Yes, sir.

“ Q. From time to time, during the eight or ten times you were there, did you occasionally speak to him, and say, ‘Do you feel better ?’ or ‘feel worse ?’ or ‘How do you feel ?’

“ A. I have not very often. I have seen him often in one room and another, but *I have not often, as long as he could not speak, spoken to him, for it was no use*, but I asked Mrs. Rollwagen.

“ Q. You asked Mrs. Rollwagen ?

"A. Yes, because *I saw it was no use to speak to him.*" (Fols. 2354 to 2358.)

The witness had been well acquainted with Mr. Rollwagen for a great many years, and, when he was able to talk, had been in the habit of conversing with him freely. Lena admitted to this witness that Rollwagen had lost the power of speech. The witness testified :

"Q. Did she [Lena] say how he was getting along?

"A. *She said it was a stoppage of speech that he had.*" (Fol. 2358.)

While the witness was there, Rollwagen was extremely weak and feeble, so much so that Lena had to move him in and out of bed. The witness testified :

"Q. Did you see him in bed at any time?

"A. Yes, sir; I saw him once in bed in the second story back room. He was in and out within two or three minutes. Mrs. Rollwagen took him out again.

"Q. Did she lift him out of bed?

"A. Yes; *she lifted him out of the bed*, and helped him into the front room." (Fol. 2361.)

He saw Lena feed Rollwagen with a spoon. He further testified :

"Q. During the time you were there, did you notice whether he seemed to be getting more and more feeble and helpless?

"A. Yes; I saw he was getting more feeble all the time." (Fol. 2362.)

In July, *Charles Stephan* saw Rollwagen at his house, sitting in a large arm-chair; he said, "How do you do?" Rollwagen made that sound and nodded. Witness then paid him interest money. During the interview Rollwagen was unable to say a word, and did not speak.

Ann Browning, a sister of Mr. Browning, who is the father of the children who are the grandchildren of the deceased, called in July on Mr. Rollwagen. She went with her little niece, Barbara. The witness testified :

"Q. Did you speak to Mr. Rollwagen ?

"A. I walked right up to him and said, 'How do you do, Mr. Rollwagen ?'

"Q. Did he say anything ?

"A. No, sir.

"Q. He did not say anything ?

"A. Not a word.

"Q. Did you shake hands with him, or take either of his hands ?

"A. I put out my hand to shake hands, but he did not shake hands. * * *

"Q. Did he grasp your hand at all ?

"A. Not at all.

"Q. How long had you known him ?

"A. It was over twenty years since I first knew him." (Fols. 2226-7.)

During the entire interview Mr. Rollwagen said nothing.

"Q. When you took hold of his left hand slightly, did he say anything ?

"A. No; he did not speak—he did not speak at any time.

"Q. During your entire interview on this occasion, did Mr. Rollwagen speak at all ?

"A. No, sir; he did not." (Fol. 2229.)

The witness tried to get her niece, the granddaughter of Mr. Rollwagen, to engage his attention, if possible. She testified :

"Q. Did you say anything to your niece with reference to Mr. Rollwagen ?

"A. I simply said, 'Go up to your grandfather.'

"Q. Did she do so ?

"A. She did.

"Q. Did Mr. Rollwagen make any noise or do anything ?

"A. No, sir; only merely moving his left hand towards her when she stood on that side.

"Q. Did he make any noise with his throat ?

"A. Only when Lena went to him and stood up close by him; then he made some sort of a noise in his throat."

* * * * *

"Q. Anything which you could understand ?

"A. No, sir." (Fols. 2230 to 2232.)

Lena, on this occasion, performed the same part she enacted on other occasions, when people called upon Mr. Rollwagen. The witness testified :

“ Q. When he made this noise in the throat, was it when Lena was talking to him apparently ?

“ A. She went up and put her ear to his face ; and then he made that sort of noise. * * *

“ Q. Did you hear what Lena said to him at this time ?

“ A. She said ‘ Hi ! hi ! hi ! hi ! what ! what ! what ! hi ! ’
“ That is the amount of it—to know what he said.” (Fol. 2232.)

The witness says Rollwagen, on this occasion, sat with his mouth open and his tongue protruding. (Fols. 2234–5.)

After Rollwagen made this peculiar noise in his throat, Lena professed to understand what he meant ; she told Mrs. Browning that Rollwagen said, when he saw her, she reminded him of her brother-in-law, Mr. Stuyvesant, who was then dead. (Fols. 2235–6.)

The witness says that on this occasion Rollwagen had on a flannel shirt, which was open quite low on the chest ; she stated to Lena that she feared he would take cold ; Lena gave her to understand she had no fears on that subject. (Fol. 2237.)

Lena told the witness that Rollwagen was unable to control the calls of nature ; that she had to attend him constantly, and that “ that was the reason she could hardly take time to change her dress.” (Fol. 2239.) She testified :

“ Q. During the time he had been sick so long, he could not control the calls of nature ?

“ A. Yes, sir.

“ Q. What did she say about leaving him, and going down stairs ?

“ A. She said she could hardly go down stairs to see about anything ; she apologised, or something, for her dress ; she said very often she had not time to change her dress.

“ Q. On account of that difficulty ?

“ A. On account of this thing.

"Q. You cannot state whether during that interview she kept a vessel ready for such a purpose?

"A. There was one there at that time." (Fol. 2241.)

The witness states that, on this occasion, Rollwagen had on only his drawers and flannel shirt and stockings; that he had on no pantaloons. (Fol. 2242.)

Bernard Schaaf saw the decedent on the 11th of August, 1873. On that day he received a payment of \$7,000 upon his contract (fol. 1754). A check had been given upon the bank purporting to be signed by Rollwagen. The clerk of the bank called, on this occasion, to ascertain in regard to the correctness of the signature to the check. I invite attention in this connection to the following extract from the evidence of this witness :

"Q. Who spoke first ?

"A. Mr. Rollwagen's wife spoke to him about that check. "[This was the check for \$7,000 to pay Schwartz & Lehman.]

"Q. What did Mr. Rollwagen's wife say to him ?

"A. I cannot tell what it was; but I guess it was, 'Are you satisfied with that check ?'

"Q. When she said that to him, did he do anything ?

"A. The clerk says, 'Are you satisfied with Mr. Herrmann signing his name to that check ?' and he makes, " 'Ehn, ehn, ehn, ehn.'

"Q. At the time he said that, did he move his head ?

"A. No.

"Q. After the clerk of the bank asked Mr. Rollwagen if he was satisfied, and after Mr. Herrmann signed the check, and Mr. Rollwagen made the noise you describe, what next was said by anybody ?

"A. The clerk of the bank said, he says—'That is all right.'

"Q. Then you did what ?

"A. Then I signed my name to the bill and he gave me the check. * * *

"Q. Who gave you the check ?

"A. I took it from Mr. Herrmann ; it lay on the table.

"Q. Did you take the check ?

"A. Yes.

"Q. Received it in payment ?

"A. Yes, sir.

"Q. What was the amount, if you remember the check ?

"A. \$7,000." (Fols. 1759 to 1762.)

The witness stated that during this interview Rollwagen said nothing which could be understood by anyone. The witness testified :

"Q. State whether he did most of the time ? [Make the "peculiar sound described from his throat.]

"A. Most of the time, when anybody spoke to him he says 'Ehn, ehn, ehn, ehn,' and 'Wehn, wehn, wehn.'" (Fol. 1765.)

Jacob Moore saw Mr. Rollwagen during the last week of August, 1873. Rollwagen said nothing whatever, although the witness tried to talk to him. He testified as follows :

"Q. When you asked him (Rollwagen) a question, did you notice whether his lips were together or apart ?

"A. They were not together.

"Q. His lips were open ?

"A. Yes.

"Q. *Were they open all the time during your interview ?*

"A. *Yes, sir.*

"Q. How was his tongue ?

"A. His tongue was *protruding* over his under lip. (Fol. 2106.)

* * * * *

"Q. *State whether, during that whole interview, his lips were open and tongue protruding ?*

"A. *Yes, sir.*" (Fol. 2111.)

Jacob Moore was a friend of Mr. Rollwagen, and of his sons.

This fact was well known to *Lena*. She thought it important that she should profess to Mr. Moore that she was able to converse with and understand Mr. Rollwagen. On this occasion Rollwagen made a slight attempt to lift his hand ; of course it was the left hand. I invite your attention to the following extract from the evidence :

"Q. His tongue out, and his lips open, and he attempted to get his hand up ?

"A. He got it up ; but I don't think it was over an inch or so ; then Mrs. Rollwagen said, ' He wants to know how Mrs. Dugro is.'

"Q. As Mrs. Rollwagen said that, was Mr. Rollwagen's lips open and tongue protruding ?

"A. Yes ; that way [showing mouth open and tongue slightly protruding].

"Q. During that entire interview, were his lips open and his tongue protruding in the same way ?

"A. Not during the entire time, because she fed him after a while.

"Q. What did she feed him ?

"A. She gave him some kind of soup or gruel.

"Q. With a spoon ?

"A. Yes, sir.

"Q. Did she put it in his mouth ?

"A. She did.

"With the exception of the time she fed him with a spoon, were his lips open and tongue protruding in that way during the whole interview, as far as you can remember ?

"A. As far as I remember they were, because he could not swallow it." (Fols. 2112 to 214.)

Lena stated to this witness that Rollwagen was unable to control the calls of nature. On this subject he testified as follows :

"Q. Did she say anything at that time in regard to Mr. Rollwagen's ability to control the calls of nature ?

"A. She spoke to me about that.

"Q. What did she say ?

"A. That she had a great deal of trouble with him.

"Q. In that respect ?

"A. Yes, sir.

"Q. Tell what she said ?

"A. That she had to change very often his clothes and underclothes, and she had a great deal of trouble to get him up and bring him to the chairs. * * *

"Q. Did she say anything as to whether he had any control of himself in that respect—calls of nature ?

"A. She told me he had not." (Fols. 2108-9.)

The witness noticed that Rollwagen's right hand was swollen. He testified :

“ Q. What was the condition of his hand ?

“ A. *His right hand was somewhat swollen.* (Fol. 2111.)

I have in brief called your attention to the lay testimony on the part of contestants, which comes down to near the period of Mr. Rollwagen's death. I will not stop here to comment upon the testimony of some of the witnesses who saw him the Sunday before he died, when it is claimed by one that he uttered the word “up;” but will refer to that testimony subsequently.

I will now call your attention to the evidence of proponents in respect to the physical condition of decedent during the year 1873.

First, in point of time, is their witness *Frederick Perry*. He says that he saw Rollwagen on the 10th of February, 1873. His mother went with him. Now, I can excuse this witness for considerable fondness for Lena. During the first five years of his life she was a servant in his mother's family. She was his nurse; and although there was no special intimacy until after Lena went to live with Rollwagen, and had cast her longing eyes upon his estate, yet from that time on the former employee of Mrs. Perry seems to have struck up a calling acquaintance with her, and very naturally the sympathies of this young man were aroused in favor of the alleged widow. He says that he talked with decedent about his College; that Mr. Rollwagen asked him how he liked the place, how many students there were. He says: “Then he asked me how long I had been going to College, that included my fitting course; I suppose that meant since I was away from New York” (fols. 3898-9). The witness says that he experienced no difficulty in talking with decedent and in understanding all he said; that it was not necessary for Lena to interpret for him (fols. 3901-2). This witness states also that he conversed with decedent, and decedent talked with him, about his classical

studies, and that he explained particularly to him the Latin books that he was pursuing (fol. 3904).

This young Sophomore seems to have been endowed with wisdom in advance of his years, in advance of the age. His ideas were so keen that they penetrated the brain of an imbecile, and set in motion a tongue that had long been paralyzed. The wonder is that the young Sophomore was not struck dumb with amazement to hear the dumb man talk so glibly, and display such extraordinary erudition, especially in view of the fact that the decedent's education had been so defective that he never could read or write. He must have thought that the deceased, on account of his physical condition, had attained a transcendental state of existence. When in possession of his faculties—when alive—he took no interest in matters of education; but now that his intellect had expired, now that he was dumb, almost if not entirely deaf, now that he was paralyzed, and to all intents and purposes *dead*, this paragon of a Sophomore thought surely a dead man would be interested in the dead languages, and so he belabored him with Latin and Greek.

The next witness to whose testimony I shall call your attention is *Charles F. Schimoll*. He states that he saw Mr. Rollwagen in February, 1873; that his son Frederick was there, and he and his father talked together (fol. 4021). Frederick Rollwagen has been on the witness stand, and denies that a word was said on that occasion between him and his father.

The next witness, on behalf of proponents, is *Ferdinand Knittel*, the keeper of a lager bier saloon. He says that he went with his brother to see decedent some time in January or February, 1873; that his brother lived near Verona; that he had never seen Rollwagen but once, and that about ten years before, when they met accidentally at Harmonia Garden, in Essex street, at a ball one night; that on his

arrival here he, for the first time in his life, expressed a wish to see Mr. Rollwagen. The witness took him to see decedent, and says that he and decedent had some conversation together. Your Honor will bear in mind that this witness was a particular friend of Henry Herrmann. He gives us the particulars of the extent to which they drank together. He stated—what seems a little remarkable—that he had never spoken to anyone on the subject of his evidence. This fact, unimportant in itself, he had never disclosed to anyone, until called to the witness stand. He states that on this occasion the decedent spoke very hard—
 “a little above a whisper; he spoke with great difficulty
 “apparently; it seemed to be very hard for him to get out
 “a word (fols. 3675–6); he seemed to have to strain himself
 “to get the words out” (fol. 3679).

The witness states that during this interview Lena interpreted :

“Q. Did she, in most of the conversation, tell what she claimed Mr. Rollwagen said, and explain to him what the others said ?

“A. Yes; but not all.” (Fol. 3694.)

So it would seem that at this time Lena did the interpreting; and the fact is clear that Rollwagen did not talk at all.

William Finkernagel testified that he was a mason, and also kept a lager bier soloon; that in July, 1873, he saw Mr. Rollwagen at the new house, and that Rollwagen said “How do you do?” (fol. 3752); that he pointed at witness’s little girl and asked “Is that your girl?” and then said “She get big” (fol. 3754). Witness states that Rollwagen said nothing more during the whole interview. Henry Herrmann was there, and the witness says that Rollwagen said to him, “Henry tells you what to do in Fourteenth street” (fol. 3755). This witness then got a job to work on Mr. Rollwagen’s property, under direction of Herrmann. He knew that Henry Herrmann—his particular friend—

acted as agent for this estate, and that he had only to ask Henry Herrmann for the work; but he tells us that Henry Herrmann directed him to go and see Mr. Rollwagen. Then he and Herrmann went together to Mr. Rollwagen's residence, and Mr. Herrmann gave him the job. The witness had no motive to go and see the decedent; and his story is altogether improbable. But whether Mr. Rollwagen did say those few words, is not of much importance.

Nicholas Rose, the coachman for Theisz, was called for the purpose of proving that Rollwagen talked in 1873; but he proved exactly the contrary. He proved that Rollwagen did not speak, to his knowledge, during that year. The last time he heard him say anything, was when he took him out riding; and the words "Dry Dock Bank" (fol. 3936) were uttered by him, as he thinks. He says that this was six months before Mr. Rollwagen moved into the new house; according to that it was in the year 1872. He said that after that Mr. Rollwagen had tried to talk in his presence, but could not succeed.

William Frederick Kaiser thinks that he saw Mr. Rollwagen in January, 1873, and says that Rollwagen nodded his head to him, but did not say anything which he understood.

Joseph Foerster was called by proponents. He stated that in the summer he called upon Mr. Rollwagen, that Herrmann introduced him and said, "This is Mr. Foerster, the man who will make your cornices and do your roofing work in the new building on the corner of Essex and Stanton streets" (fol. 3965). The witness states that up to that time he had never done any work for Mr. Rollwagen. At that interview he got the idea that Mr. Rollwagen pronounced the word "money" (fol. 3969), although he was not very clear on the subject. Rollwagen did not and could not say anything else during that interview. On that occasion witness saw Lena feeding him; he had

meat in his mouth when witness thought he said "money" (fol. 3973). With a paralyzed tongue, a paralyzed throat, and a mouth full of meat, it is not very likely that Mr. Rollwagen could have audibly and intelligibly pronounced any word or syllable.

Frederick Grassal was called for the purpose of proving that Rollwagen talked during the year 1873. At first he thought he said something during that year, but on his cross-examination he took it all back. This question was put to him, and he testified :

"Q. In December or January last, or thereabout, did you say to Mr. Newschafer, at 219 East 31st street, in this city, that the last time you ever heard Mr. Rollwagen talk or say anything was the summer before he, Mr. Rollwagen, moved from the old house into the new house in 9th street ?

"A. Yes, sir. * * * *

"Q. I ask if that is true, what you have just stated that you told Mr. Newschafer ?

"A. *That is true.*" (Fols. 4005-6.)

The witness swears that it was the year before that he heard Rollwagen speak, which would make it early in the summer of 1872, since which time he had not heard Rollwagen pronounce a word. Mr. Grassal was an old gentleman of infirm memory, and may well be excused for not recollecting facts any better.

Christopher Bendiger testifies that he was at Mr. Rollwagen's in May, 1873, to collect a bill for wines; that Rollwagen was present, but that Lena paid him the bill (fol. 4072). He does not say whether Rollwagen spoke during the interview. It does not appear by the testimony that this witness heard Mr. Rollwagen talk since 1871.

Margaret Boese was a servant in the family of Mr. Rollwagen for four months, ending February 27, 1873. Although she was born in Alsace, the place of the nativity of Mr. Rollwagen, yet she was not able to understand any-

thing he said when she first went there. She did testify that she understood some things he said while she was there; but that statement she substantially took back on her cross-examination. She testified as follows :

“ Q. The latter part of the time, in February, 1873, you understood him ?

“ A. Not all, but some.” (Fol. 4304.)

She also testified that in June she understood something that he said, and she states that he made the same noise in his throat as has been described by the other witnesses. She could not understand it, but Lena interpreted. She testified :

“ Q. Had you been there three months before you could understand one word he said ?

“ A. I do not know. * * * * *

“ Q. Are you sure that in the month of February you heard him say one word that you could understand ?

“ A. Yes, I think—I don’t know for sure.” (Fols. 4333-4.)

Bella Rollwagen, the wife of Louis Rollwagen, was called, and said that this witness stated last Fall that, during the whole time she was there, she could not understand one word that Mr. Rollwagen said. She is flatly contradicted, and her testimony is therefore substantially out of the case. The witness Margaret Boese proves Mr. Rollwagen’s physical infirmities. She testified as follows :

“ Q. Did you help turn him over in bed every night when Lena was sick, or when Mrs. Rollwagen was sick ?

“ A. Yes, I guess I was helping him all the time in bed when she was sick.” (Fols. 4339, 4340.)

Henry Applehaus states that he was introduced to Mr. Rollwagen in 1869 by Henry Herrmann, and that he was at Mr. Rollwagen’s house in Ninth street in the Spring of 1873; that Mrs. Rollwagen, Mr. Rollwagen, Mrs. Herrmann and Henry Herrmann were there. He testified :

“Q. What did you say to Mr. Rollwagen when you went there in the Spring of 1873 ?

“A. I did not say much. He asked me about Hicksville —that was always the first thing he asked for. I told him the man did not buy the ten acres of land of Mr. Kuhl; I had found that out afterwards.” (Fol. 4351.)

The witness states that he saw Mr. Rollwagen in July or August, 1873.

“I couldn’t understand him; I heard him mention the word ‘Hicks,’ but I couldn’t understand all, and his wife helped him. . . . He was eating ice cream, and laughed aloud, and was talking *through his wife*.” (Fols. 4352-3.)

This witness explains just how all the others understood Rollwagen—he talked through his wife—that is, his wife told what she claimed he said.

John C. Hoch says that he saw Mr. Rollwagen in April, 1873; that he had known him for some years; thinks that in April he understood some words or most of what Rollwagen said, but later than that could not understand him much; that after April Lena had to interpret for him. Mr. Hoch was an old acquaintance, who had known Mr. Rollwagen for a great many years, and he may well be excused for misremembering what Rollwagen said, and taking what Lena said for what he supposed the old gentleman intended to utter. He says that in April or May Mr. Rollwagen told him that Herrmann was his agent. This was undoubtedly said by Lena. She began, he says, as early as June to interpret for him. The witness states that he is not sure whether it was in the Spring of 1873 that he first found it difficult to understand Rollwagen. He states that through the Summer Mr. Rollwagen got worse and worse. This witness is also contradicted by Frederick Rollwagen. He testified to certain conversations and declarations of the deceased when Frederick Rollwagen was present, but which conversations Frederick denies. The witness states that he saw Mr. Rollwagen in September, 1873, in the front area,

but could not understand anything that he said ; that Rollwagen nodded to him. The witness states that he told Mr. Rollwagen he had better put on a thicker coat, or he would take cold ; and that Mr. Rollwagen, in reply, made that guttural sound from the throat, accompanied by a motion with his hand. When this witness was asked whether Mr. Rollwagen was of sound mind, he answered as follows :

“ A. Of sound mind up to the last Sunday, and until I considered he was in a dying state ; then I did not consider him of sound mind.”

The witness states that the last Sunday he saw him was the Sunday before he died (fol. 4555).

Ernest Ohl states that he saw Rollwagen in January or February, 1873. He is the man who purchased the house, 312 Ninth street. He testified that sometime in 1873 he thought Mr. Rollwagen “spoke in a kind of way, but did not understand what he said” (fols. 4591-2). Lena did the interpreting, as usual (fol. 4593). Subsequently witness made the agreement, through Lena, for the purchase of the house (fol. 4594). On cross-examination this witness said that in January or February, 1873, when he saw Mr. Rollwagen, Lena interpreted and told him what she claimed Rollwagen said. The witness has a faint idea that Rollwagen said “yes” during one of those interviews. He testified on cross-examination as follows :

“ Q. Mention a single word which you will swear you heard him pronounce on that occasion ?

“ A. I understood him, ‘yes.’

“ Q. Did you hear him pronounce aloud the word ‘yes’ ?

“ A. *Not aloud.*

“ Q. Did you hear him pronounce at all the word ‘yes’ ?

“ A. Yes, kind of slowly—*half-way like.* (Fols. 4619-20.)

“ Q. You don’t remember his saying anything but the word ‘yes’ during that whole interview. Is that so ?

“ A. Yes, sir.” (Fol. 4622.)

The witness thinks that during April Rollwagen pronounced the word "no" (fols. 4631-2).

This testimony bears a striking similarity to the evidence of the witnesses in the Parrish Will Case, some of whom thought that they heard Mr. Parrish speak the word "yes" or "no."

George Schmidt, a painter, states that he saw Mr. Rollwagen in April, 1873, about working on the new house; that Rollwagen was in bed. He testified that, "When I 'came in there he said 'You nearly loose the job. I want you.' " (Fol. 4660.)

Lena was there, and unquestionably this conversation was had through her. The witness said that he afterward called on Mr. Rollwagen, and that he wanted \$880, and that Rollwagen said it must be \$875 for doing the work; that he refused to do it for that, and then Rollwagen said, "Go on." He states further that after that Mr. Rollwagen spoke to him and said, "How do you get along up there"? (Fol. 4669.) During all these interviews Lena was present and she undoubtedly interpreted to this witness as she did to the others.

Julius Boeckell, the architect, was called, and he proved that in the month of May, when he called on decedent, Rollwagen said nothing which witness could understand; that witness discussed business—as to whom he should get to do the work for him, and at what prices, &c., but that Rollwagen said nothing. All the talking was done through Lena. This witness is evidently mistaken in some things, although on the stand he appeared to be a candid man; and I attribute his inaccuracies entirely to lapses of memory, and not to any disposition intentionally to misstate. This witness mentions one important fact—that when Rollwagen drank, he raised his glass with his *left* hand (fol. 4727). The witness states that he could understand nothing said by Rollwagen, and that when he (the witness) spoke, Rollwagen nodded his head, and "made a sound, but I

could not understand him" (fol. 4730). Witness states that they talked about the business, and Hermann and Mrs. Rollwagen said that Mr. Rollwagen was satisfied. Lena did the interpreting. Witness told Rollwagen that Sharp was awarded the job. He testified:

"Q. When you told Mr. Rollwagen that, what did he do or say?

"A. He made a sound, and Mrs. Rollwagen asked me "whether he was a good man." (Fols. 4737-8.)

Afterwards the contract was signed, and Henry Hermann signed Mr. Rollwagen's name to it under the circumstances which I have already mentioned. Then Mr. Rollwagen moved his *left* hand, and Lena said he meant by that he knew Mr. Schwartz (who was present there) from the time he was a little boy. This shows in what way Lena was construing Mr. Rollwagen's motions. Of course she knew all the parties there. She knew Mr. Rollwagen's history, and consequently she could put into his mouth any declaration she saw fit in order to give an air of plausibility to assumed interpretations. This witness states further that he called again in July to see Mr. Rollwagen in relation to the carpenters' work, and Mrs. Rollwagen said Mr. Rollwagen wanted that he should be shown the house. The witness testifies to a rather remarkable statement, in which he says that he thinks that Mr. Rollwagen in August, 1873, said: "I want to build four houses." (Fol. 4774.) This witness has mingled what Lena said with what he thinks Rollwagen stated. The houses referred to are the ones in Avenue A, which are specified in the codicil, and it may be that Lena had some scheme of her own with regard to those houses in respect to which she wished to use Mr. Boekell as architect. At all events, it is very apparent that this witness is mistaken when he states that Mr. Rollwagen said anything.

Perhaps, before I leave the subject of the evidence of

proponents in relation to the physical condition of the decedent in the year 1873, I ought to call your attention to the testimony of three witnesses who have given stronger evidence for the proponents than perhaps any others in the case, so far as the subject of talking is concerned. I allude to those whom I designate as "The Three Graces"—Margaret Miller, Henrietta Perry, and Amelia Schmoll.

Margaret Miller, the washwoman, testifies that she knew Mr. Rollwagen for 28 years. She states that he talked all through the year 1873. She testified :

" Q. Did he say anything to you in the new house about Mrs. Perry ?

" A. He loves her. She makes him sometimes company.

" Q. That is what he said ?

" A. Yes, sir.

" Q. Did he say anything about Mrs. Schmoll ?

" A. He likes Mrs. Schmoll, too. (Fol. 4114.)

" Q. Did you ever hear Mr. Rollwagen say that he loved any other woman than Mrs. Perry ?

" A. No, sir. * * * *

" Q. Did you ever hear him say that he loved his first wife ?

" A. Yes, sir. * * * * *

" Q. Did you ever hear him say that he loved anyone but his first wife and Mrs. Perry ?

" A. No, sir." (Fols. 4195-6.)

It is very extraordinary that this dumb man should be talking so affectionately with regard to two ladies in this case, and particularly with reference to Mrs. Perry ; and it is somewhat more extraordinary that he should confide his love matters in this way to the old washerwoman. According to her testimony, Rollwagen's inveterate love for Mrs. Perry had run through a long series of years. Mrs. Miller further testifies :

" Q. When did you hear Mr. Rollwagen say he loved Mrs. Perry ?

- “ A. He said that last year.
- “ Q. How long before he died did he say he loved Mrs. Perry ?
- “ A. That was a couple of months before he died.
- “ Q. Did you ever hear him say before that, that he likes Mrs. Perry—that he loves Mrs. Perry ?
- “ A. Yes, sir.
- “ Q. How long before did you hear him say it ?
- “ A. He said it is about a year ago—two years ago ?
- “ Q. About two years ago ?
- “ A. Yes, sir.
- “ Q. Did you ever hear him say prior to two years ago that he loved Mrs. Perry ?
- “ A. Yes, sir.
- “ Q. How long before two years ago did you hear him say he loved Mrs. Perry ?
- “ A. Two years ago. He loves Mrs. Perry—always loves her.” (Folios 4192–3.)

It is very remarkable that this dumb, imbecile, paralytic old man should express such devotion for Mrs. Perry. From her fascinating appearance on the stand, I should certainly have supposed the avowals of tender regard for her would have come from a man in a very different condition from Mr. Rollwagen ; that if those protestations were made at all, they would come from a live—not from a dead man. The witness testified :

- “ Q. Did Mr. Rollwagen ever tell you he loved you ?
- “ A. No, sir ! ” (Fol. 4197.)

The old washerwoman scorned the idea that this old man had any affection for her, although he was so profuse in his avowals of love and devotion for Mrs. Perry, and expressed so strongly his liking for Mrs. Schmoll. According to this testimony, he regarded those two ladies with more fondness than he did Lena. She further testifies :

- “ Q. Afterwards, when you came there, and saw him there, what did he then say about Lena ?
- “ A. He likes Lena.” (Fol. 4100.)

In the first place, this witness contradicts herself suffi-

ciently to exclude her testimony. She admitted that before George went to California she could not understand Rollwagen when he spoke. This was a year before Rollwagen died. The witness then could not understand him at all, as will be seen by the following extract from her evidence :

“ Q. When you tried to talk with him, before George went to California, did you say ‘ Papa, I can’t understand you ; wait until Lena comes,’ * * * * did this occur very often ?—yes or no ?

“ A. Yes.” (Fols. 4155–6.)

This witness has admitted that for a year before Rollwagen died she could not understand a word he said. She was compelled to admit that. She is now in the employ of Lena as her washerwoman. She is the most extraordinary witness produced upon the trial. She states that in the third month of Lena’s pregnancy, Lena told her (the witness) of her condition. This would be about the latter part of May. The witness states that, in the new house, Rollwagen talked to the workmen. But those who were working there say that Rollwagen did not talk to them. The witness further states that she stayed with the decedent two or three weeks before he died, and she put some very extravagant declarations into his mouth during that period. To these declarations I shall advert in another branch of my argument. She gives a conversation which she states occurred three nights before Rollwagen died. Had Mr. Rollwagen been a sane man, he would never have uttered the declarations which she attributes to him ; but whether sane or not, as he was dumb, he certainly did not make them.

The witness states that Lena sometimes fed Mr. Rollwagen, and that sometimes he fed himself. Among the conversations which she attributes to Mr. Rollwagen, she states that he showed her some presents which he said he had made to Lena.

Henrietta Perry states that she visited Rollwagen in

1873, and had conversations with him, and she mentions pretended conversations in January. She states that Rollwagen said to Lena when she was present, "Let Mrs. Perry see the new presents I brought you" (fols. 4234-5), and that Lena then showed witness a shawl and black silk dress, and that Rollwagen stated they were presents to Lena.

Barbara Sheppard testified that Lena stated that Mrs. Perry went with her to Stewart's to purchase a silk dress and a shawl, and that she gave large prices. Mrs. Perry testifies that such was not the fact; that nothing of the kind occurred. I prefer to believe Mrs. Perry's statement, and to believe that, when Lena stated that fact to Barbara Sheppard, for some reason or other, she told her an unmitigated and unqualified falsehood. Mrs. Perry's testimony simply proves that Lena made a false statement to Barbara Sheppard, and it proves nothing more.

This witness claims that she visited Mr. Rollwagen in February, March, April and June, and on each of those occasions he talked with her. This embraces the period of time when Barbara Sheppard was there with her mother, and although decedent did not talk to them, Mrs. Perry wants to make it appear that he talked frequently to her; and she gives the details of what she claims Mr. Rollwagen said in relation to a power of attorney. She remembers, or professes to remember, conversations with him in April. She states that on the Sunday before Mr. Rollwagen died she was present, and that he pronounced the word "up." Mr. Frederick Rollwagen who was also present on that occasion, proves that nothing of this kind occurred.

Amelia Schmoll testifies to conversations with Mr. Rollwagen during the year 1873. Frederick Rollwagen, who was present, proves that no such conversations occurred. She also states that she (and not Mrs. Perry), went with Lena to purchase a shawl and dress. She states that in the Summer of 1873, she saw Rollwagen once a week, and sometimes twice a week; that she always conversed with him; that his "voice was low; it was kind of hoarse."

(Fol. 4388.) The witness states further, "He always had my hand in his; he always held fast to my hand." (Fol. 4389.) She testifies to a very remarkable statement in that respect. Why he should be so extremely affectionate towards her does not appear. She says she could always hear him speak during the Summer; that he talked without any difficulty whatever; that she never experienced any difficulty in understanding him. She states that she had a conversation with him on the 24th of September—the *very day on which Dr. Tully called and examined Mr. Rollwagen*—and it was a most extraordinary conversation. She testified as follows:

"Q. What did he say?

"A. When I came I shook hands and said 'How do you feel?' he said, 'very bad.' I thought, it was the weather; he said 'I think I am going to die soon.' I said to him 'O, no, I guess not.' He said 'well, I feel very weak.' I said " 'You must not die yet; we are going to have a christening first, when that little Rollwagen comes to town, and you and I are going to dance in the parlor.' " (Fol. 4397.)

On cross-examination, in reference to this matter, she testified further, that she meant every word she said.

Now, this is most extraordinary testimony. It only shows how far a lady will go in swearing for the benefit of another. This man, within a few days of death, who, as Dr. Tully says, is in the last stages of paralysis; who is drooling at the mouth—more on one side than on the other; who has a paralyzed tongue, which forbids the possibility of uttering a word; who is suffering from a paralysis which has existed for a period of several years; this man is represented by the witness, Schmoll, as taking part in a long conversation with her, and listening approvingly to a proposition to dance with her on an interesting occasion in the future. Upon her oath she asserts that she meant what she said.

I cannot better answer this evidence than by sketching the scene with as much delicacy as the conspicuous and undisputed facts of this case will admit. Let us imagine the

scene. What a charming spectacle ! What a lovely and bewitching couple ! A group of spectators gather around to witness the ceremony. All is ready. It requires one able-bodied man to get Rollwagen in position, another to set him in motion. To provide for probable accidents, another with vessel in hand is stationed on his right, another armed and equipped in the same way on his left. The dancing begins ; slowly moves Madam's majestic partner. Her head inclines to his shoulders. As on the day she talked about the little Rollwagen coming to town, tears of joy stream down his cheeks moistening her beautiful face. She is delighted at her conquest of the veteran ; soon she grows sceptical as in a slow way she

“Treads the light fantastic toe.”

Her modest eyes are downward cast ; it is not his tears that flow. Although he is dumb, his infirmities speak ; it is the lesser call of nature. The dance has exercised undue influence. His effusion of joy, in his young partner's brilliant presence, has been too much for him. Nature now calls in the other way. Madam's zeal in the dance abates. Lena arrives on the scene, and officiates as usual upon such emergencies. Her services were never more opportune. Thus ends the dancing scene.

Mrs. Schmoll says that Rollwagen spoke in a low tone, above a whisper, and that he uttered the words “How did you like the wedding ?” (fol. 4441). She further testified :

“Q. Did he speak those words without any difficulty at all ?

“A. Yes, sir. (Fol. 4445.)

“Q. Did he speak those words in a clear and distinct tone of voice ?

“A. Yes, sir.

“Q. And in a tone of voice above a whisper ?

“A. Above a whisper. (Fol. 4448.)

“Q. Did he seem to be forcing at all in uttering those words ?

“A. No, sir. (Fol. 4450.)

“Q. In that way did you keep on talking to him and he

"talking to you, he speaking the words he spoke in a clear and distinct tone of voice until Lena came ?

"A. Yes, sir." (Fol. 4451.)

She actually says that he was strong on this occasion.

"Q. Did he shake hands with you ?

"A. Yes, sir.

"Q. With his right hand ?

"A. Yes, sir.

"Q. Did he *press* your hand in taking it ?

"A. Yes, sir. * * * *

"Q. Did he with his right hand press your right hand *strongly* ?

"A. Yes, sir." (Fol. 4459-60.)

This is the most extraordinary statement that I ever read or heard. This witness swears that, with his paralyzed and helpless right hand, he took and pressed and squeezed her hand as strongly as he could have done when in a good state of health. The witness says that when she proposed to dance with him he laughed heartily and said "yes." She testified :

"Q. Then when you proposed to him to await the arrival of the young Rollwagen, what did he say, if anything ?

"A. He laughed and said 'yes,' too.

"Q. Did he laugh very heartily ?

"A. Yes, sir ; he laughed until the tears rolled down his cheeks.

"Q. *Did he shake his sides with laughter ?*

"A. His body shook." (Fol. 4465.)

Here this witness represents this old man as possessing almost Herculean strength ; and that in consequence of her invitation to dance with him on a future occasion (which she swears was made in earnest) he laughed until tears of joy ran down his face, and his great body shook with laughter. She testified :

"As far as I could judge *his right arm was strong.* * * *

"Q. When did you first discover that he did not appear to be in sound perfect health—strong and robust ?

"A. *I always considered him strong.* * * * * *

"Q. In the Summer of 1873, he did not seem to be quite "in perfect health, did he?"

"A. He did not appear to be as strong quite as formerly." (Fols. 4501 to 4503.)

This witness actually swears that, although she visited Rollwagen every month and every week, and sometimes several times a week, for a year or two before he died, she never perceived that he was out of health. She testified:

"Q. When did you think for the first time that he was "not as well as the average of well people?"

"A. In the Summer of 1873.

"Q. *As late as August you first observed that?*

"A. Yes, sir; I observed it in August. * * * * *

"Q. *You don't remember to have observed anything the matter with his health before the Summer, and you think August, "1873?*

"A. No, sir." (Fol. 4504.)

The witness swears that Rollwagen was a strong and robust man until August, 1873! Then to cap the climax—because you would suppose that a witness who had testified as she had, was acting under a strong bias and feeling—she actually swears that she has no interest at all in this case, and don't care which way it goes.

The evidence of "the Three Graces" is extraordinary, if not startling. That the facts testified to by them are not true—by no human possibility can be true—has been demonstrated by the evidence of contestants, upon which I have already commented. I will show by the medical evidence, which is uncontradicted, that the facts stated by Mrs. Miller, Mrs. Perry and Mrs. Schmoll, existed only in their imaginations. Before discussing the medical evidence, I will refer to the testimony given by the officers of the Butchers' and Drovers' Bank.

Henry Herrmann was asked, on his cross-examination, whether, within a month or two before the death of Mr. Rollwagen, he took him to the Butchers' and Drovers' Bank. He most emphatically denied the fact, and asserted

that the last time he was at that bank with Mr. Rollwagen was not later than the month of May, or thereabouts.

Several of the officers and one of the directors of the Butchers' and Drovers' Bank proved the falsity of this statement of Herrmann.

Robert B. Perrin, the president of this bank, testified that he had known Mr. Rollwagen, the deceased, for twenty-five years, and that Rollwagen was brought to the bank some time in September, or the very last of August, 1873. Mr. Perrin states that he returned from Saratoga to New York on the 20th of August, and he knows that it was after that time (fol. 5320). He fixes the date of this occurrence between the last of August and 20th of September (fol. 5321). The physical condition of Rollwagen at this time was deplorable. Mr. Perrin says that on this occasion he was coming out of the Bowery Insurance Company, which is in the basement of the same building in which the bank is located, on the corner of Bowery and Grand street. He says:

"I was just coming out, and got on the top step of the walk, and I saw this Mr. Rollwagen with *two or three men holding him up.*" (Fols. 5322-3.)

Mr. Perrin states that Rollwagen did not move at all, and that "he (Rollwagen) could not have moved at all without their aid" (fol. 5324), namely, the assistance of the two men who were holding him up. He testified:

"Q. What did these men do, if anything, with him after that?"

"A. He was helped up the steps in the bank, and a chair was set out; he sat down by the window; I saw him sitting down by the window when I went up." (Fol. 5324.)

The witness says he himself had business which called him out of the bank, and he passed right into the street and saw him (Rollwagen) sitting (fol. 5326).

The witness says that he heard of Mr. Rollwagen's death at the time it occurred, and it was that which so vividly

impressed the fact upon his memory, that he had been at the bank so recently (fols. 5329-30).

In relation to Mr. Rollwagen not speaking, the witness testified :

“ Q. Did Mr. Rollwagen speak or say a word which you heard or understood ?

“ A. No, sir.” (Fol. 5334.)

Denton Piersall, one of the directors of this bank, testified that he had known Mr. Rollwagen well for twenty-five or thirty years, and that he was present on the occasion when Rollwagen was brought to the bank, as stated by Mr. Perrin. He states that Rollwagen was brought there the latter part of August, or early in September (fol. 5337), and that he heard of Rollwagen's death a day or two after it occurred (fol. 5357-8), which impressed upon his mind the fact that Rollwagen had been there so recently.

The witness says he returned from the country on the 20th of August, and he knows that Rollwagen was brought to the bank after that. (Fol. 5338.)

The object of bringing Rollwagen to the bank at this time, was, that those who were with him could get at the contents of his private tin box, which he kept there. Rollwagen could not write or sign an order on the bank to permit anyone else to open the box, and, of course, the bank officers would deliver it to no one except to Mr. Rollwagen, or some one who was present with him. At the time Rollwagen was brought there, Mr. Piersall was in the back-room of the bank.

The following extract from his evidence will show what he first observed :

“ Q. Were you in the back-room or the front-room ?

“ A. The back-room. I was sitting in the back-room ; “ the door was half closed, and I heard *a rattling as though somebody was bursting them in*. I was reading the paper, “ and I got up, and saw Mr. Rollwagen with two men hold “ of his arm : there could not but one get through the door “ with him. We have a table as long as that standing in

"the room" [pointing to the counsel's table, which is 7 or 8 feet long]. (Fol. 5340.)

The witness says the one who had hold of Rollwagen drew a chair to one end of the table and sat him down in it; his tin box was brought to him and opened.

The witness testifies :

"Q. By whom ?

"A. *By the gentleman who was with him ;* the papers were taken out and laid on the table. The old gentleman (Mr. Rollwagen) put his hand in the tin box, and moved his nails around on the bottom of the box." (Fol. 5341.)

On cross-examination, the witness stated that he "saw him (Rollwagen) rattling his nails on the bottom of the box." He thought Rollwagen had his right hand in the box (fol. 5348).

It does not appear that Mr. Peirsall's attention was particularly directed to the fact, whether it was Rollwagen's right or left hand which was in the box, although the description "of the rattling of his finger nails on the bottom of the box," may well apply to the tremulousness and shaking of Rollwagen's paralyzed right hand.

The witness identifies Henry Hermann as the man who was with Rollwagen on this occasion (fols. 5343-4). He says that the gentleman (Hermann) who was with him (Rollwagen) took the papers out and put them on the table. The following is the description the witness gave as to Mr. Rollwagen's physical condition at that time :

"Q. What did you observe as to Mr. Rollwagen's physical condition and his appearance at that time, if anything ?

"A. It was *awful bad*.

"Q. In what respect ?

"A. In *every way*. I didn't hear him speak a word, or anything of the kind. He *was awful*.

"Q. As to weakness or strength, what was his appearance ?

"A. He *was very weak indeed*.

“ Q. Had you ever seen him in such a condition before ?

“ A. No, sir.” (Fol. 5343.)

This witness says he didn't see any lady with Rollwagen at the time he came to the bank (fol. 5353). This is accounted for, by the fact that Mr. Piersall was in the rear room, and Lena, who came there with Henry Hermann, could not have gone into that room, but probably remained in the carriage, in the street, or in the front room of the bank.

Elihu G. Tucker, Paying Teller of the Butchers' and Drovers' Bank, testified to the same occurrence.

His station as Paying Teller is near the street door. Those who enter the outer room at once pass by the paying teller's station.

He says that a lady and gentleman were with Mr. Rollwagen as they entered the outer room (fol. 5374). The witness observed Mr. Rollwagen sitting in the chair in the outer room and spoke to him, but Mr. Rollwagen made no answer; he simply made a noise with his throat (fol. 5371). The witness thought that, both the lady and gentleman with Mr. Rollwagen, after he had rested a while, started with him to go to the back room. He did not observe them further at this time. He did not see the parties in the back room. Rollwagen said nothing on this occasion.

The witness was asked to fix the time of this occurrence. He answered, “ I think it was in September, as near as I can remember ” (fol. 5376). It is very clear from the testimony of these three witnesses, that two men and one woman were with Rollwagen at this time. It is equally clear that Henry Hermann was one of the men, and that Lena was the woman. It may be that the other man was the coachman. The testimony is silent upon this point. It is very evident that Rollwagen at this time was in a perfectly helpless and very feeble condition. From his appearance on this occasion, the bank officers must have

feared that he would die before he could be removed from the bank.

Either just before, or just after, this occurrence at the bank, the codicil in question was executed. That bears date the 5th of September, and the subscribing witnesses all testified that it was executed at that time.

It is clear that while at the bank Rollwagen could not speak, for he was addressed by those whom he had known intimately for twenty or thirty years, and with whom he had long had business relations.

Mr. Bellesheim testified that when the instructions for drawing the codicil were given, Rollwagen did not say a word or syllable which he could understand. The instructions were given by Lena in Rollwagen's presence.

At the time the codicil was executed, *Mr. Bellesheim* and *Dr. Goulden* testified in the most positive and unequivocal manner, that Rollwagen did not say—or speak—so much as one word.

The evidence of the subscribing witnesses will be discussed more fully in a subsequent branch of my argument.

Charles Schwartz, the builder, of the firm of Schwartz & Lehman, on the 7th of October, called at Rollwagen's place for the purpose of getting the first payment due him, which was \$2300. Rollwagen was lying in bed, and Lena said he was sleeping. When she said this she spoke very low (fol. 1867). A check for the amount of the first payment due Schwartz & Lehman was then drawn, and he says, "Mrs. Rollwagen signed the check" (fol. 1868).

Rollwagen neither did nor said anything on this occasion.

The witnesses on behalf of contestants, who testified to Rollwagen's physical condition and his inability to speak, were his intimate acquaintances (many of whom had known him well for the last twenty-five or thirty years), and those who had business relations with him. They could not be mistaken in their evidence. Their attention was specially drawn to his physical condition, *and his want of the power of*

speech. His misfortunes impressed them deeply. They can never forget the spectacle he presented, as contrasted with the man whom they had known in former years. He was but a wreck of the Frederick Rollwagen of former days.

In examining carefully the evidence of the witnesses introduced on behalf of proponents, you will clearly perceive that Rollwagen had not the power of speech during the year 1873.

Many of the witnesses for proponent admit this, either directly or impliedly. Some of them, however, testified in the most positive and emphatic manner that Rollwagen could talk, and that he did converse. On their direct examination the subscribing witnesses to the will and codicil, testified with still more emphasis, that Rollwagen talked on the occasions of the execution of those instruments. These witnesses stated the precise words which they allege that Rollwagen spoke; yet on cross-examination they *admitted that he did not speak at all.* This fact was only elicited after a very long and severe cross-examination. Many of the witnesses who testified that Rollwagen talked during the year 1873, were not cross-examined at length. Had they been, perhaps they might have been forced to admit, as the subscribing witnesses did, that he did not speak at all.

As the case of the contestants was so overwhelming, it was not thought to be worth the expenditure of time necessary, to compel these witnesses—by the resistless power of truth—to admit as did the subscribing witnesses, that Rollwagen could not speak.

One fact is established beyond all question, by uncontradicted and undisputed evidence, namely, *that with reference to all the business transactions of Mr. Rollwagen, (or rather the business transactions which were done in his name) during the year 1873, he did not converse or speak a word.*

In April, 1873, at the time Rollwagen signed the contract for the purchase of the new house in Ninth street, he did not say a word.

In May, 1873, Rollwagen was taken by Lena and Henry

Hermann to the Murray Hill Bank, for the purpose of enabling them to tell the officers of the bank, that when the \$17,800 check was received, the bank should pay it, as it had been given for the payment of the new house in Ninth street. On this occasion as appears by the evidence of Mr. Striker, the cashier, Rollwagen could not, and did not speak a word.

When the contract was signed by which Rollwagen agreed to sell the old house to Ohl, and his partner, which was about the middle of May, 1873, Rollwagen did not say a word.

At the time the deed of the old house in Ninth street was executed by Rollwgen and Lena to Ohl and his partner, Rollwagen said nothing. This was about the middle of June, 1873.

At the time of the making and execution of the contract for the mason work of the building, which was the latter part of June, Rollwagen said nothing.

At the time of the making and execution of the contract with Schwartz & Lehman for the carpenter work upon this building, Rollwagen said nothing.

During the five weeks that Challier was engaged in repairing the new house, during which time he saw Rollwagen almost daily, Rollwagen said nothing.

At the time of the execution of the will on the 17th of June, Rollwagen said nothing.

At the time Lena and Henry Hermann took him to the Butchers' and Drovers' Bank, early in September or the last of August, Rollwagen said nothing.

At the time of the execution of the codicil on the 5th of September, Rollwagen said nothing.

In view of the overwhelming and undisputed proof, adduced by proponents as well as contestants, that Rollwagen during the year 1873 was entirely speechless, in reference to all these business transactions of his own (or rather which were carried on in his name, and for his benefit during that year), it would be most extraordinary that he should talk so

freely as some of proponents' witnesses represent about the business of other people. If he talked at all, his tongue would certainly be unloosened upon the subject of *his own business affairs*. His devotion to his business would outweigh his devotion to Mrs. Perry and Mrs. Schmoll. If his large business interests could not set his tongue in motion, it is reasonably sure that the influence of Mrs. Perry and Mrs. Schmoll would not be strong enough to induce him to wag his tongue for their edification.

The case of the contestants was so strong upon its merits, that I intended originally to prove all the facts by witnesses who had no interest whatever in the final result.

For this reason I did not call, before resting our case, any of the children or grandchildren of the decedent. But after the proponents had put in their evidence in reply to that of the contestants, I deemed it my duty to offer to prove by all the sons of the decedent, that for "years prior to the death of the decedent, he had never said or pronounced a word or syllable in their hearing which they or either of them did, or could, understand." (Fol. 5310.)

This evidence was objected to by the counsel of proponents on the ground that it was cumulative, and the objection was sustained. There was no necessity whatever for introducing this evidence before the contestants rested, as the testimony given by disinterested witnesses was so abundant and conclusive. There was no necessity for the introduction of this evidence at any time, for the reason that contestants' case was overwhelmingly proven by the testimony of entirely disinterested witnesses. I have already shown that the evidence of contestants is in no way shaken, nor is its force in the slightest degree diminished by the evidence of proponents.

In concluding this branch of the case, I will invite your Honor's attention to the medical evidence.

Dr. Goulden, who presented a very strange attitude on the witness stand, admitted that during the last year of Mr.

Rollwagen's life, he had great difficulty with reference to his speech. He stated, however, that he had made no examination of any kind of Mr. Rollwagen's throat for the purpose of ascertaining what that difficulty was.

In this connection, it should be borne in mind that Dr. Goulden admitted that when he was requested by Lena, in presence of decedent, to become a subscribing witness to the will and codicil, and at the time both instruments were executed, the decedent did not and could not speak.

Dr. Tully attended the decedent from 24th September to 11th October, when he died. Dr. Tully was the physician called by Lena Hermann, or by some of the Hermanns, not by the Rollwagens. He is a man of great candor—of great fairness—and he gave his testimony prompted by no bias whatever. He was a stranger to our side of the case until we called him as a witness. What does he say? I will read a portion of his testimony because it is very important, and I prefer that your Honor should hear it as it fell from his lips.

“Q. In your judgment, what was the cause of his death?”

“A. Paralysis. * * * I should think he had it two or three years from the indications in the case. * * * I asked Mrs. Rollwagen when he had the first attack, and she said about three years. * * * I examined, and I saw it was an advanced case—in an advanced stage—and there was very little hope of recovery.” (Fols. 5482 to 5484.)

He also stated on his direct examination that, during the entire time he attended him, Rollwagen did not speak at all, and that, in his opinion, it was a physical impossibility for him to speak. He stated, on cross-examination, the particulars in regard to the paralysis; that from his own observation his medical opinion was that it had continued for about three years; and he gave a medical certificate to that effect. The information which he derived from Lena herself corresponded with his own observation of the

case. This paralysis embraced one-half of the system. Dr. Tully stated that this man's tongue was paralyzed; that he examined his tongue with reference to this paralysis, and his inability to speak, and gave him medicine with reference to his paralysis of speech. Dr. Tully cannot be mistaken about this. He testifies to physical facts; and the fact that your Honor sits in that chair, and that I stand upon this floor, could be no more clearly proven six months hence than the physical appearances of Mr. Rollwagen were established by the evidence of Dr. Tully. On cross-examination he further testified:

"Q. Did you use the word paralysis at the time you were speaking to Mrs. Rollwagen about how long he had been in that condition?

"A. Yes, sir.

"Q. You are positive?

"A. Yes; I asked her how long it was since he had the first attack of paralysis. (Fol. 5517.)

"Q. Did you judge that he had a paralytic stroke three years before from your own observation?

"A. I should say he had it some time before. . . . I should say two or three years certainly from my observation.

"Q. I am asking you your judgment, based solely upon your own observation?

"A. I might say that he was in the last stages of the trouble, and at the time I pronounced it so. (Fols. 5489-90.)

"Q. During all the time that you attended him, did he speak or pronounce any word or syllable in your hearing which you could understand?

"A. He did not. . . . If he had the strength, *from paralysis of the tongue, he could not articulate.*" (Fol. 5485.)

In other words, if he had the physical strength to speak, he would not be able, owing to the paralysis, to utter a word.

"Q. When you visited him, did you speak to him?

"A. I did. I addressed him invariably, so as to see if I could get any articulation from him—to see if he had any

"understanding of what I said to him, by getting an answer. (Fol. 5496.)

"Q. Did he not sometimes indicate to you that he felt bad, or worse than he did at other times?

"A. Nothing that I could understand, . . . his tongue being partially paralyzed. (Fols. 5497-8.)

"Q. Did you prescribe for him, based upon her [Lena's] statement of what he said were his feelings?

"A. Not altogether. I went upon my own judgment about his paralysis, &c. * * * *

"Q. Did you ever make any examination of his throat?

"A. I examined his mouth and more particularly his "his tongue." (Fols. 5500-1.)

Re-direct examination.

"Q. Did you examine the tongue of Mr. Rollwagen with reference to his paralyzed speech?

"A. I did.

"Q. What was his condition?

"A. One side was very flabby—showing a paralyzed condition of his tongue. * * * *

"Q. Did his paralyzed condition, including the paralyzed portion of the tongue, prevent the power of utterance or of speech?

"A. I consider it so in his case." (Fols. 5531-2.)

Then the doctor gives another symptom which is of importance in this case:

"Q. State whether Mr. Rollwagen, during the time you attended him, had any dribbling from the mouth?

"A. He did.

"Q. To what extent?

"A. Considerable, so that they had to wipe it off a number of times. * * * He could not retain the saliva in his mouth without assistance. He did not have the power to spit it out; it would dribble away. I considered it the result of his paralyzed condition. * * * * It came down on one side of the mouth more than the other." (Fols. 5534 to 5536.)

There is no medical evidence to the contrary. All the medical evidence is on one side. It is from the only wit-

ness who speaks from a personal observation, made for the purpose of ascertaining the condition of the decedent.

In this connection I will call your attention to the language of the Court of Appeals in the opinion delivered by Judge Porter, in the case of *Tyler vs. Gardner* (35 N. Y., 574), on the subject of admissions. I do it for the purpose of showing that inasmuch as Lena has not been examined here, she has virtually admitted our whole case; and the doctrine for which I contend is the doctrine of the Court of Appeals. In that case Mrs. Tyler did not go upon the stand; and the Court of Appeals gave great emphasis to that fact, and said that she was chargeable with an admission of all the facts testified to against her for that reason:

“There is an almost wearisome monotony in the conformity of the facts developed on the hearing, with the familiar and recognized indicia of contrivance and undue influence. There are few of the reported cases, in which wills have been condemned, presenting such a concurrence of circumstances unfavorable to the establishment of the instrument. If they were susceptible of contradiction or explanation, the sources of proof were abundant. The respondent was a competent witness. Most of the material facts were within her personal knowledge. She was a prominent actor in all that related to the will, and in the series of transactions which led to so complete a revolution of intention on the part of the testatrix. She was surrounded by a numerous household; the important events were of recent occurrence; and they transpired at her own residence. When we find the party whose right and interest it was to countervail the force of the facts by evidence, content to leave them un rebutted and unexplained, and to abide by the conclusions to which they so clearly tend, we have nothing to do but to draw the inevitable inference, and applying the settled rules of law to sustain the rejection of the will. It may be that the whole truth of the case is not before us; that facts exist, which, if proved, would relieve it from some of its unfavorable aspects; but we are bound to take the evidence as we find it, and to give it effect in accordance with our clear convictions.”

In view of this rule of law, laid down by Judge Porter in this case, I will call your attention to the admissions of Lena upon two subjects: I shall show, first, by her admissions that during the period in question, the decedent could not speak.

William Challier, on his examination, testified:

“ Q. Did she (Lena) tell you whether he (Rollwagen) could speak loud or not ?

“ A. She told me that he was not able to speak.

“ Q. When did she tell you that ?

“ A. When I was at work there.” (Fol. 1995-6)

Lena admitted to Anna M. Browning that Rollwagen could not speak.

Nicholas Graham testifies:

“ Q. Did she (Lena) say how he (Rollwagen) was getting along ?

“ A. *She said that it was stoppage of speech that he had.*” (Fol. 2358.)

Lena stated to the witness *Heynemann* that Rollwagen had paralysis. (Fol. 1810.) This was during the last year before his death.

“ Q. Could you tell whether it was as much as six months? Can you fix anywhere near the time it was that she told you that he was paralyzed ?

“ A. It must be about a year. (Fol. 1812.) * * * In 1873 I could not observe whether he made a motion of his lips or not. He looked to me to be perfectly paralyzed.” (Fol. 1839.)

In respect to his inability to control the calls of nature, Lena's admissions are proved by the following witnesses, and their testimony is uncontradicted. She told the witness *Jacob Moore*, that Rollwagen had no control over himself in that respect. (Fol. 2109.) Lena told *Anna M. Browning* the same thing. (Fol. 2239.) She made the same admission to *Barbara Koch*, and also to *Barbara Sheppard*. (Fol. 2719.) The decedent's misfortune in that respect is also proven by *Charles Whalen*. (Fols. 3144-5.)

In this connection I wish to call your attention to an extract from the opinion of Judge Davies, in the case of *Delafield v. Parish*, (25 N. Y. 44) in speaking of the same misfortune in reference to Mr. Parish.

“ His inability to control the calls of nature is a marked and prominent fact in this case, and such inability has ever been regarded as a distinguishing evidence of the loss of mental power.”

Lena understood this matter well, and she has throughout manifested her idea of opposing the dictates of the ties of nature, by her attendance on the unfortunate decedent in reference to the calls of nature.

When the decedent's friends came near him his fondness for them was unmistakable. Sometimes he would show it in one way, and sometimes in another. Not unfrequently he would manifest it by weeping copiously. Often, very often, was his natural affection for those of his own blood, watered with tears of sorrow at their absence, and tears of joy at their presence. Bound as he was to Lena by the strong ties of necessity, his feeling towards her was manifested in a different way; the ties which connect my clients with the decedent are those of natural affection. Living, he was the object of their devotion and love; dead, they hallow his memory.

Lena knew his fondness for his children and grandchildren. How different were the ties which bound him to his children from those that fastened him to Lena? She officiated in place of a body servant. She performed the most menial services, from 1869 to 1871, for fourteen dollars per month. In respect to every call of nature, his dependence on her was pitiable, almost revolting. She was a servant in his family many years ago, when one of his sons was not born, when another was but a prattling boy. She knew that Rollwagen's existence was wrapt up in his children. She thought she could overcome the strong *ties* of nature, by her unvarying, necessary attendance upon his *calls* of nature. However necessary to his enjoyment—his very exist-

ence indeed—might be his parental affection, she seemed to think that she was still more necessary. He might not be greeted with the sight of his children for a day or more, but his calls of nature almost forbade her absence for a single hour. Affluent as he was, with property whose value approached a million, she would permit him to have no other body servant. Her services in this regard were to be the pretext for the robbery of his estate. She could supplant his children in no other way. She persisted in her determination that her connection with his *calls* of nature should overpower the *ties* of nature, by which he was bound to his children. She seemed to fear that if another attended him, he would in some way let out the secret of her despotic power, and thus be purged of the merciless control she exercised over him.

On the subject of the physical condition of the decedent, the whole evidence proves:

1st. That Rollwagen was unable to read and write.

2nd. That for the last four or five years of his life, he was hard of hearing.

3rd. That for two or three years before his death he was paralyzed.

4th. That for two years or more he had no control over himself in respect to the calls of nature.

5th. That, for one or two years before his death, he was dumb—entirely speechless—and had no way of communicating his thoughts and wishes, if he possessed any.

I will now proceed to the discussion of my

SECOND POINT.—The decedent did not sign, nor did he authorize any one to sign on his behalf, or aid him in signing, either will or codicil. Someone else wrote what purports to be his signature to each instrument, probably using his hand in writing.

None of the statutory requirements in relation to the execution of testamentary instruments, were, in letter or spirit, observed.

The authorities all hold that those who propound a will for probate, must prove a compliance with all the formalities required by statute. In other words they must show: (1) That the party signed the alleged testamentary instrument; (2) that he either signed it in the presence of the witnesses, or in their presence acknowledged the signature to be his; (3) that he asked them to be witnesses to the instrument; (4) that he published and declared it as his last will and testament. The burthen of proof is upon the proponents in respect to all these matters. In this case, within the meaning of the statute, not one of these requirements was complied with. That is to say: Rollwagen did not sign the will; he did not publish and declare it as his will; he did not acknowledge it to be his will; he did not ask the witness to sign it. In other words, Mr. Rollwagen had no more to do with the execution of the will or codicil than your Honor, or myself, or any person in this room, other than the Hermanns.

In point of fact, to all intents and purposes, Rollwagen had no more to do with the execution of the will and codicil, than the furniture in the room or any inanimate object. That he did not sign the will or codicil, but that each instrument was signed by some one else, I shall demonstrate by the evidence. That whoever wrote decedent's name to each instrument used his hand in writing is a matter of inference, for it is to be presumed no one would dare write his name to these instruments without using his hand in so doing.

There is no pretense in the evidence, that decedent authorized anyone to write his name, or to guide his hand, or in any way to aid him in writing. While a party has a right to authorize another to sign his name for him,—while the making of a cross might be sufficient,—

yet such authority is not to be presumed ; it is to be proved. In this case no such authority is proved or pretended to have been given. There is not a *scintilla* of evidence even tending to show that Rollwagen delegated any authority to any person whatsoever, either to sign for him or write with his hand, or to guide or in any way control his hand in writing.

If it appear that Rollwagen did not write his name to the will or codicil—or it is not clearly proven within the rules of evidence that he did sign these instruments—this point would be fatal to the proponents and decisive in favor of the contestants. At the time the will and codicil were executed it was physically impossible for decedent to write his name. That he wrote what purports to be his signature to either instrument was a physical impossibility.

I will show, first, that it is not proved that he signed either will or codicil, and, second, that in point of fact he did not sign either of these instruments. If Mrs. Schmoll testifies that on the 24th of September, 1873, Rollwagen talked with ease and fluency, and that his right arm and right hand, at that time, possessed great muscular power, and it is proven by lay testimony and medical evidence, based on a thorough personal examination, that at this identical time, the tongue, right arm, and right hand of decedent were paralyzed, so that he was entirely deprived of the use of them ; her testimony that he did talk fluently, and so use his right hand and right arm, as to evince great muscular power, does not overcome the fact that it was physically impossible for him to do so.

How can we prove that Rollwagen, on the 24th of September, did not talk and carry on the long conversation with Mrs. Schmoll, to which she testifies with such extraordinary particularity ? It is sufficient to say that we prove this by the evidence of Dr. Tully, the attending physician, who examined decedent's tongue at that time, and testifies that it was paralyzed, that it had been for a long period, and that even if Rollwagen had strength suf-

ficient, it was a physical impossibility for him to speak a word.

How can we prove that a man did not make a certain signature? If we show that the man never wrote at all—never learned to write—that it was impossible for him to write—that is one mode of proving that he did not write. Suppose, for instance, we prove—and the fact appears by making *profert* of the man in Court—that both arms are amputated; and a witness swears that this man with his right hand wrote a certain paper subsequent to the amputation of his arms—the fact that a witness so swears does not overcome the conclusion arising from the physical impossibility of the party to do the deed which it is alleged that he performed. Precisely this reasoning applies to Mr. Rollwagen. We have proved that, at this time, writing was to him a physical impossibility. All of the subscribing witnesses swear that he wrote the signatures to the will and codicil with his right hand. We have proved that at this time his right arm and right hand were paralyzed; and that it was therefore a physical impossibility for him to write with that hand. What better proof can we produce to show that he did not write those signatures? It is true that we have to meet the evidence of the three subscribing witnesses; I will analyse their evidence presently, and show from it that they are either intentionally or unintentionally mistaken. Where the facts will permit it, I prefer to attribute the mistakes to inadvertence, and shall not impute a want of honesty to the witnesses unless the facts fully warrant it, and duty to my clients imperatively demand it at my hands.

Throw out of view for a moment the will and codicil, and *there is no paper which the deceased did sign during the year 1873.* There is no pretence that he signed any other paper with his own hand, unaided by any one, except the check for \$17,800, used for the payment of the new house, No. 312 Ninth street. There is no proof in the case, except the testimony of Henry Hermann, that he signed that check.

Henry Hermann, who is impeached from the beginning to the end of this case, who is branded with falsehood from the crown of his head to the soles of his feet—does swear that he saw Mr. Rollwagen sign that paper; that he and Lena were present at the time. Henry Hermann also swears that Mr. Rollwagen did not have paralysis; that his right arm was not powerless; that no portion of his body was paralyzed. Henry Hermann swears that with his own ears he heard Mr. Rollwagen talk to Dr. Tully on several different occasions; and that he heard Mr. Rollwagen with his own voice explain to Dr. Tully his ailments. Dr. Tully proves that that was a physical impossibility; and what is more, he proves that when Henry Hermann swore to that fact, he swore to what he knew to be false; and that he had no regard for the sanctity of his oath, in his desire to absorb and appropriate to his family's use, the large property of Mr. Rollwagen. Henry Hermann's evidence is incredible; and upon every rule of law ever sanctioned by any court of record, his testimony, except so far as he makes admissions against himself and his sister must be stricken from the case. He is in conflict with all the other evidence. He swears to physical impossibilities. He swears that when Mr. Rollwagen went to the Murray Hill Bank, he talked just before and just after. He swears to certain other matters. He swears that he did not take Mr. Rollwagen to the Butchers' and Drovers' Bank since May or June, 1873. And yet it was proved by the testimony of three or four witnesses that so late as last August, or early in September, he took him there. Henry Hermann has appeared throughout this case, as a witness, totally unworthy of belief; as one fully capable of scheming to get the property, and to rob those to whom, as he claims, he is allied by blood. He is the nephew of the mother of my clients. He has dragged that in evidence in this case. He and his family were poor relatives; they were treated with kindness by Mrs. Rollwagen; Lena was received by her as her servant when they first came to this country. Mrs. Rollwagen then befriended

Lena in her poverty and distress. The family now seek to repay that kindness by doing what I pronounce to be worse than larceny ; they seek to rob this estate, to rob their own flesh and blood of hundreds of thousands of dollars, under circumstances upon which I will comment in another branch of my argument. I only allude to these facts now for the purpose of showing that Henry Herrmann, as a witness, is branded with falsehood ; that his testimony cannot stand in this case a moment, unless you impute perjury to innumerable witnesses, whose testimony is unimpeached, and unimpeachable.

I will proceed to show by numerous facts and circumstances, by the evidence of the subscribing witnesses, and by other testimony in this case, that in point of fact Mr. Rollwagen did not sign either the will or codicil ; and that in point of fact it was physically impossible for him to do so. You have before you this fact—that the signature of Lena to certain papers—among others the marriage certificate, the Deed of the old house, and some letters—bears a remarkable resemblance to that of Mr. Rollwagen. It is very apparent that for a year or more she has been cultivating her writing with a view to imitate his signature. The checks produced are signed by her ; and the signatures to them are an imitation of the signature of Mr. Rollwagen, as will be readily seen on inspection. These papers are all before your honor ; and the Court of Appeals have held that, while for the mere purposes of comparison, papers irrelevant to the case cannot be introduced, yet, when they are once in evidence for any purpose, the Court and jury have a right to compare them ; and if they are important with reference to any issue involved in the case, it is the duty of the Court and jury to make that comparison. For instance, this Deed was introduced, not for the purpose of comparison, but to show transactions by Rollwagen. The proponents introduced the marriage certificate to prove a marriage ; and every paper to which I shall refer has been introduced for a legal purpose, outside of the question of

comparison of handwriting. Upon comparing the signatures—F. Rollwagen and Magdalena Rollwagen—to the Deed with the signature of Lena to the marriage certificate, it is perfectly apparent that they are in the same handwriting; that Magdalena Rollwagen is written by the same hand, and in substantially the same style, as “F. Rollwagen.” Mr. Ohl proves that Lena took hold of Mr. Rollwagen’s hand, and guided it, when he was making the signature to the Deed. I claim that the proof is, that Lena wrote both signatures. It is true that Mr. Ohl says that he saw Lena “help” Mr. Rollwagen write. How much force she used in guiding and controlling his hand he did not know. That is my inference. In regard to the contract for the purchase of the new house, Mr. Sackett testifies in so many words, that Rollwagen made no movement in signing except as guided and controlled by Lena. He says that the pen was put into Rollwagen’s hand, and it dropped out; he could not hold it; that then Lena took it, and made the motions with his hand. When asked, on cross-examination, the extent of that control, he said that Mr. Rollwagen made no motions of his own; and a reading of his testimony will show, beyond all question, that Lena Hermann wrote that signature to the Deed. Now, if she wrote the signature to the contract, which was written before that signature to the Deed (for the signature to the contract for the new house bears date as early as 17th April), I maintain from the appearance of the signatures to the will and codicil, that it is perfectly evident Mr. Rollwagen had nothing to do with the signing of either instrument. I propose to show by a comparison, that the signature, “F. Rollwagen,” is in the same handwriting as the signatures “Magdalena Rollwagen” and “Frederick Rollwagen” on the papers to which I have called your attention. But before making a minute comparison, I will call your attention to certain facts about which there can be no dispute. *Why was it that Mr. Rollwagen was permitted to sign no paper in the year 1873, except so far as his hand was guided and con-*

trolled by Lena Hermann, with the solitary exception, as the other side claim, of the will and codicil? Mr. Rollwagen either possessed the power to sign his name, or he did not. I have proved beyond all peradventure that this paralytic old man could not write with a paralyzed arm. We have proved that he could not, by any human possibility, have written his signature. Let us look at these papers in the order of date. The agreement dated 17th April, 1873, is for the purchase of the new house. Rollwagen made no movement in signing his name to that agreement, except as guided and controlled by Lena. *Sackett* testified as follows:

“Q. State whether or not, she made all the movements of the pen?

“A. She did.

“Q. Did Mr. Rollwagen himself, move his fingers at all?

“A. Not without her assistance.” (Fol. 2559.)

Lena did not come on the stand to contradict that testimony. It is proved by a credible, respectable, fair-minded witness, that she wrote the signature to the contract with Mr. Rollwagen's hand.

On cross-examination the witness testified:

“Q. No movement of the hand? Will you swear that no movement of the hand was made by Mr. Rollwagen himself?

“A. To the best of my recollection, no movement was made except by her guiding his hand.” (Fol. 2615).

I have already stated that the contract between Rollwagen and Ohl, for the sale of the new house, was signed by Lena. She guided and controlled the hand of decedent. The Deed of the old house is dated 14th June, 1873; and the contract, as Ohl testifies, was made two or three weeks before; so that it is proved that at those dates, Mr. Rollwagen was unable to write; and it is proved by such testimony as Lena is bound by, unless she goes on the stand and contradicts or disproves it by the testimony of some credible witness. Lena admitted to Ohl, that Rollwagen

could not write. The excuse she gave, was that he was too nervous. If on the 17th of April and in the middle of June, he could not write with that paralyzed arm, (and it is admitted that he could not,) how could he, with that same arm, write the signature to the will on the 17th of June, when all the testimony shows that he was rapidly wasting away, and his march to the grave was so rapid? The evidence of proponents, as well as that of contestants, shows that he was growing weaker and weaker,—that he was getting worse and worse all the time. If this were so, I should like to know where he got the power needed to write the signature to the will on the 17th of June.

I will now direct your attention to a remarkable resemblance between these four signatures of Lena to the checks, and the signature to the will. Say what you please, I think it fairly appears from the evidence, that Lena Hermann wrote the signature to this will. Here are her signatures, admitted to be true. Why did she not go upon the stand, and under her oath, say whether she wrote the signature, "F. Rollwagen," to the will?

On the 4th of June it became necessary for Mr. Rollwagen, or some one on his behalf, to sign the contract with Schaff, the mason. On that day they go through the *form* of making a contract with Mr. Rollwagen upon one side, and Mr. Schaff on the other, for certain mason work. It is necessary that that contract should be in writing. If Rollwagen is able to write, why don't he make his signature to that contract? This is on the 4th of June, thirteen days before the signature to the will. He did not put his name to the contract. Some of them ask Mr. Rollwagen if Hermann can sign it. A nod and a grunt are given by decedent, and they are interpreted to mean that Mr. Hermann can sign Rollwagen's name. Henry Hermann's testimony in reference to this, is in conflict with that of all the other witnesses. The other witnesses who testify that they were present when the contract was signed, say that Mr. Rollwagen did not utter a word; but Henry Hermann,

when he comes upon the stand, swears that Rollwagen turned and said to him, and said "Henry, you sign." (Fol. 4956.) Every other witness present states that Rollwagen said nothing of the kind; that he did nothing but make that peculiar noise in his throat. Here is Henry Hermann, convicted of falsehood by his own witnesses—by Boeckell, by Schwartz, by every one who was present on that occasion. Hermann swears that he was directed to sign it. He had just as much direction in regard to the other papers as in relation to that.

Let us progress a little further. We have now proved that the only papers signed by or purporting to have the signature of Mr. Rollwagen, were signed by Lena, she writing with his hand.

This observation applies (1st) to the contract for the new house, dated 17th April; (2d) to the contract for the sale of the old house, which was about the middle of May; and (3dly) to the Deed of the old house, which was on the 14th of June, three days before the will was signed. These papers beginning with the 17th April and ending on the 14th of June, were none of them signed by Mr. Rollwagen, except so far as another wrote the signature with his hand. Now, if upon the 14th day of June, three days before the date of this will, it was impossible for him to write his name (and Lena tells Ohl that it was impossible, because he was too nervous to write), I would like to know how he got the strength to write that signature to the will on the 17th of June. That is a remarkably good signature for Mr. Rollwagen—as good a signature as he could have made in his palmiest days.

I will ask your Honor to look at the signature to the marriage certificate, which it is claimed that Rollwagen signed. The signature to the will on the 17th of June is an infinitely better signature than that made, or alleged to have been made, in September, 1871. I would like to know—if Mr. Rollwagen wrote that signature to the marriage certi-

ficatc (and while we may question it, the other side cannot) why it was that in September, 1871, his hand was so tremulous that it was almost impossible for him to write ; and yet on the 17th of June he wrote this signature to the will, which is written remarkably well, and quite as well as his average signature during the time he was in perfect health.

I will now call your attention to the signature of decedent to the bank checks in 1869. Your honor perceives that the signature to the will, although written in a somewhat different hand, is written quite as well as Mr. Rollwagen wrote in 1869. He was a poor writer at all times, so far even as writing his name was concerned.

I will call your attention to the Deed signed by Magdalena Rollwagen, three days before the will ; and I call your attention to the similarity between the handwriting of Lena as it appears in the Deed, and the signature to the will. The resemblance is such as strikes the eye at first sight. A detailed and critical examination of these various signatures would demonstrate the correctness of my views. It is not necessary for me to contend that if Lena wrote that signature to the will, she did not use the hand of Rollwagen in writing it. That may be. It is idle to contend that Mr. Rollwagen himself, without somebody using his hand, wrote the signature. All the proof in the case establishes the contrary. Lena admitted three days before the signing of the will that he could not write, saying that he was too nervous to write. If he were too nervous on the 14th day of June to write his name, I would like to know how his health was so improved after he moved into the new house, that he was able to write so well on the 17th June, when all the witnesses say that from that time he sank very rapidly, because the excitement of moving and the trouble of being moved, was, doubtless, very prejudicial to his health.

I call your attention to the further fact, in this connection, that all the checks given in the way of business in the year 1873, were signed by Lena Hermann. I refer to checks which bear date subsequent to the first of May.

But few were used, yet all of them were paid to different parties, who were kept in profound ignorance of the fact that they did not bear the original signature of Rollwagen. If she were acting honestly in this, if Henry Herrmann were acting honestly, why did not she or he go to the bank and say to the cashier or paying teller, that Mr. Rollwagen was unable to sign his checks by reason of bodily infirmity, and that he authorized Lena or Henry to sign his name? Why did they keep the banks in ignorance of the real facts? If Rollwagen signed the check for \$17,800, why did Lena and Henry drag him up to the Murray Hill Bank and make a parade of him, to induce the bank officers to believe that the check was genuine? Why would not the check be paid without this parade? Was it because it was different from his ordinary signature? Was it because having signed the check with his name, they feared the bank would not pay it, and, therefore dragged this poor, weak old man, just ready to tumble into the grave, up there to identify this check as a genuine one? For what purpose was that check given? It was for the purchase of a new house which Lena desired, and which house is given to her by this fraudulent will. Lena Hermann got the value of the check. It is true that it went for the nominal benefit of the Rollwagen estate. Lena wanted a house and lot for herself and her family of starvelings, who had lived in penny groceries, occupying but one floor, using the front room for a grocery and back room for a kitchen, and, I suppose, a sleeping room for two or three of them. Now that they had gotten hold of Rollwagen, they wanted a home, and they were so greedy that, almost at the peril of his life, they dragged this old man up to the bank and made an exhibition of him. He cannot say a word. They go up to the Murray Hill Bank, and say for him, "This check is genuine. Pay it when it is presented or received through the exchanges." The bank officers at the time are not aware of the fraud being practised, and they are not ready to charge with fraud this man's alleged wife and brother-

in-law, and so, acting under the direction of Lena, they pay the check. It was drawn to enable Lena Hermann to get possession of that property. Her conduct was just as reprehensible as though she had gone to the bank, taken \$17,800, and put every dollar of it in her own name, or appropriated it to her own use.

You have, then, on this branch of the case this fact: that during the year 1873, Mr. Rollwagen wrote no signature whatever for the reason that he could not write. It was a physical impossibility. Then you have the fact that in regard to every other paper purporting to be signed by him, the signature was really made either by some persons using his hand in writing, or by writing his name with their own hands. Then, in addition you have the medical proof as to his physical condition, and all the other evidence relating to his inability, which I have discussed under my First Point,—but it applies equally well in this connection,—proving conclusively, as it does, that the physical weakness of Mr. Rollwagen rendered it a literal impossibility for him to use his right arm, or to use his tongue—for the reason that they were both paralyzed.

But the counsel upon the other side will say that it is proved by three witnesses that they saw this man sign his name to the will and codicil. Let us see about that. Those three witnesses stated certain facts which they afterwards admitted to be incorrect in every particular. They stated among other things—every one of them—that Rollwagen signed the codicil just as freely and easily as he signed the will. Their testimony is as direct upon the one point as upon the other. They first said that they were looking at him when he signed the instruments. Afterwards they took all this testimony back, and then admitted that they did not recollect his signing the paper, or else admitted that they were not looking at him when he signed it.

In respect to the signatures to the will and codicil, an inspection of them shows that the testimony of these parties—the subscribing witnesses—is incorrect. As I have

already said, they all three swore that the signature to the will was written by Mr. Rollwagen just as freely and just as easily as the signature to the codicil, and that they were both written with comparative ease. If you will look at both, you will see that they bear no resemblance to each other, with respect to the freedom with which they are written. My associate calls my attention to the fact that the attestation clause to the codicil does not even certify that the codicil was signed by the deceased. If the witnesses, in point of fact, did see the decedent write and sign his name thereto, I do not suppose that that technical omission would avail us; but if the decedent did not write his name, and did not authorize anyone else to write it, and had nothing to do with the will itself—then the omission is a very important matter.

Having shown by these facts and circumstances that the alleged widow, the chief party in interest, has admitted that at this time Mr. Rollwagen could not write; having shown that the actions of proponents corresponded with that statement—because they either signed his name or used his hand in writing the signatures to all the other papers, and having proved by the testimony of the physicians in connection with the lay evidence that this paralysis extended to a period long anterior to the writing of the will and codicil, and that the paralysis embraced the right arm—I have established the fact that the decedent did not write the signature to either the will or codicil, unless the testimony of the subscribing witnesses overthrows that evidence. That point I will now consider.

Before doing so, however, I will call your attention to one fact. We have proved that when Mr. Rollwagen wrote he wore spectacles. Without any proof on the subject, that would be the presumption in respect to a man of his years and habits; that his eyesight would be so far impaired that it would be necessary for him to use glasses in writing. It is a most extraordinary fact that a man 67 years of age can write without the use of glasses. I do not

say that there are no such cases, but, if so, they are exceptions and not the rule. The presumption, therefore, is, as I claim, that one at his time of life, and in his condition of health, he having been what might be called a very fast liver, his sight would be so far impaired that the use of glasses would be necessary. We have proved, by a number of witnesses, that in writing he did use glasses. He had no occasion for glasses, except to sign his name. There is no pretence in the case, so far as the evidence is concerned, that he was near-sighted, or that he had any occasion to use glasses for that reason. We have proved by Mr. Geissenheimer and by Barbara Sheppard, and by a number of other witnesses, that he wore glasses. We have proved by the admissions of Lena that he wore glasses. Barbara Sheppard states that when he visited her he always carried his glasses in his pocket. She states that she never saw him use them, for the reason that he had no occasion to write his name while he was with them. In February, 1873, when his niece and her mother visited him, the mother had occasion to use glasses; something was said in reference to them, and Lena, according to the testimony, said that she could use Mr. Rollwagen's glasses; and the mother put them on and found they answered her purpose very well, as she and the decedent were within two years of the same age. We have, therefore, the proof that Rollwagen used glasses. The proof is undisputed, although a great many witnesses testify that they did not see him use them. No witness has, however, testified that when writing his name he did not use them; and with the exception of the signatures to the will and codicil, there is no pretence in the evidence that, for years before Mr. Rollwagen's death, he ever signed his name to any paper without using spectacles. The fact that the witnesses say he did not wear spectacles when he was not writing proves nothing, for all of our witnesses say the same thing. He had no occasion to use them, except when he wrote.

I have shown now, from an inspection of the will and

codicil, that the subscribing witnesses are entirely wrong when they say that the signatures were written with equal freedom and rapidity. They are not. Whoever wrote with Mr. Rollwagen's hand the signature to the codicil, had more difficulty than in writing the signature to the will.

The three subscribing witnesses testified that according to their recollection Lena was not in the room until after the will was signed. They are very likely mistaken on this subject. I have shown you that the signature to the will looks like her handwriting. She used his hand in writing other signatures, and why should she not on this occasion, when she knew that he could not write? She might have been in the room, and undoubtedly was; and yet the fact might have escaped the attention of these witnesses. Bellesheim swears that he did not ask her to go out of the room during the execution of the instrument, so that unless she was away by design, she would be very likely to be there. My argument is, that she wrote the signature with his hand, and was in the room, therefore, when the will was executed.

Let us see whether there is anything in the testimony of the subscribing witnesses, which would overthrow the conclusion deducible from the testimony to which I have adverted. Mr. Bellesheim at first stated that he was looking at Rollwagen while he wrote his name; but he took that back, as he did a great deal of his other evidence, and testified as follows:

"Q. Did anybody have hold of his hand, or his fingers, when he signed?"

"A. I think not.

"Q. Do you remember—for this is important—you don't remember anything about it either way?"

"A. [After hesitation.] I wouldn't be positive about that; I would not be positive whether he was assisted in writing or not." (Fol. 225.)

If he was assisted in writing, *who* assisted? The signature bears the marks of the handiwork of Lena Hermann.

It is our theory that she wrote the signature, using the hand of Rollwagen. Although Bellesheim testified that he saw Rollwagen sign the will and codicil, yet on further reflection he took this back and testified as follows :

“ Q. I will ask you again because it is but fair to you, in view of the facts which we will prove as to Mr. Rollwagen’s physical condition, whether you are any more sure, or whether you are at all sure as to whether anybody held or guided the pen at the time of the signing of the codicil and will; whether you have any recollection on this subject whatever; whether anybody else held or guided the pen at the time he signed what is claimed—each instrument, to wit, the will and codicil ?

“ A. I have not.”

That is, he has no recollection whatever on that subject.

“ Q. You have no recollection either way ?

“ A. I have no recollection that anybody guided his hand, and I won’t swear to the contrary either.

“ Q. You have no recollection whether anybody did or did not ?

“ A. I am not positive either way.

“ Q. And you have no recollection either way ?

“ A. I have not.” (Fols. 354–5.)

He has not a particle of recollection on that subject.

Now in relation to the Ohl contract and the Ohl deed, Mr. Bellesheim was present at the execution of them, and he was asked the same thing—whether he had any recollection that anybody guided Rollwagen’s hand in the signing of these instruments—and he said as he did with reference to the will and codicil, that he did not recollect either way. It turns out that Lena did guide his hand in signing those papers, and that is proved by the proponents witnesses, and also by Henry Hermann, because after we had proved the fact by two witnesses, Hermann came upon the stand and admitted it. After the fact was proved by two witnesses, he would not place himself in opposition to their evidence, and he admitted that Rollwagen’s hand was guided. The same thing, we say, was true with reference to the will and

codicil. Bellesheim also testified that he had no recollection whether he looked at Rollwagen at the time he signed the will and codicil. He testified :

“ Q. You are not positive ?

“ A. I have no recollection of having seen him—that is, whether I looked at him at the time he was signing. I would not be positive.

“ Q. You do not recollect whether you did or did not ?

“ A. No, sir.” (Fols. 356–7.)

I will now come to the testimony of Dr. Golden. He admitted that he did not see whether anybody held the pen for Rollwagen when he was writing his signature to the will and codicil. He testified ;

“ Q. Did you see whether anybody else held the pen ?

“ A. No ; because I handed him the pen.

“ Q. At the time he was writing, did you see whether anybody held the pen ?

“ A. No.” (Fol. 900.)

Dr. Golden further testified :

“ Q. What next was done—after that was done ? Did Rollwagen sign it ?”

“ A. Yes.

“ Q. Were you looking at him when he signed it ?

“ A. No, I did not.”

These witnesses gave extraordinary testimony. They came upon the stand and upon their direct examination swore to a state of facts so utterly different from the facts elicited on cross-examination, that we would not have known, except from the names of the witnesses, that their direct and cross-examinations related to the same case even. Dr. Golden further stated ?

“ Q. Did you see anybody hold the pen for him ?

“ A. That I don't remember at all.

“ Q. You don't remember as to whether anybody held the pen ?

“ A. No, I don't remember.” (Fol. 945.)

On the direct examination he stated, I admit, exactly the

other way, but he took it all back on his cross-examination.

I stated a moment ago that the witnesses said that the signature to the will and codicil were written with equal firmness. I will quote the evidence on that point. Dr. Goulden testifies :

“ Q. Did he seem to move the pen when he signed the “ codicil as when he signed the will ?

“ A. Yes, he did the same.

“ Q. He signed it as easily and freely ?

“ A. He did like he did the other one.

“ Q. He signed one just as easily as he did the other ?

“ A. Yes, in the same way.

“ Q. Just as easily. Did he write, or seem to write, “ without any difficulty at all when he signed his codicil ?

“ A. He did it slowly.

“ Q. Any more slowly than when he signed the will ?

“ A. About the same. I did not see any difference.”
(Fols. 945-6.)

The evidence on this point clearly establishes the following propositions :

1. At the time of the execution of the will and codicil, the decedent's right hand and arm were paralyzed, and therefore he could not sign those papers.

2. During the year 1873 the decedent himself did not sign any paper whatever, although another with his hand wrote his name to various documents.

3. During the year 1873, the only person who with his hand wrote his name to documents, was Lena, the alleged widow.

4. At and about the time of the execution of the will, Lena admitted in substance that the decedent could not write his name, assigning a reason which was tantamount to an admission that it was a physical impossibility.

5. There is no proof whatever even tending to show

that Rollwagen delegated any authority to anyone to sign his name for him to the will or codicil, or guide or control him, or in any manner aid him, in signing either instrument.

6. The medical and other evidence, as well as numerous and uncontradicted facts and circumstances, prove clearly and unquestionably that it was a physical impossibility for Rollwagen to sign his name to either will or codicil.

7. The evidence demonstrates the fact that, in regard to the signing of the will and codicil, Rollwagen took no part whatever, and had no more connection with the matter than an inanimate object.

I will now proceed to the discussion of my

THIRD POINT.—If all the testimony of contestants were stricken out, and the case rested solely upon the evidence of proponents, and the most favorable construction should be given to that evidence; upon the facts and circumstances surrounding the execution of the will and codicil, as appears by the evidence of the subscribing witnesses, the Surrogate would be compelled, as matter of law, to refuse to admit to probate either instrument.

I propose to show that, upon the testimony of the subscribing witnesses, it is the imperative duty of your Honor, —in respect to which you have no discretion,—to refuse to admit to probate either will or codicil. In this connection, as throughout the whole argument, it is important to bear in mind that the burden of proof is upon the proponents. It is incumbent on them to prove, within the rules of evidence, not that the statutory requirements in regard to the execution of testamentary instruments, might possibly have

been complied with, but that, *in point of fact, they were observed in both letter and spirit*. It is incumbent on the proponents to prove that the decedent either himself gave the instructions in relation to drawing the will and codicil, or authorized such instructions to be given on his behalf; that he understood the contents of these instruments, and with a full knowledge of the provisions contained in them, signed the instruments, acknowledged them to be his, and requested the subscribing witnesses to sign them.

In order to do justice to this branch of the case, it is necessary to call your Honor's attention somewhat in detail to the important features of the evidence of each of the subscribing witnesses.

I shall first invite attention to the evidence of Bellesheim, the lawyer.

From his direct examination (fol. 110), we would have supposed that the decedent gave him instructions in respect to the preparation of the will. After he had drawn it, and upon the day appointed, he went to Rollwagen's house to superintend its execution (fol. 111).

He said that he read over the will, and that Mr. Rollwagen signed it, and requested himself and John Thiess, and Dr. Goulden to become subscribing witnesses. He testified as follows :

" Q. Then, after you read the will over, what did he say ?

" A. I asked him whether he executed this, as his last will and testament, and he said 'yes.' * * * I asked him whether he wanted us to sign our names as subscribing witnesses to the will, and he said 'yes.'" (Fols. 113-14.)

On his direct-examination, he does not give the particulars so fully in regard to the execution of the codicil. It would be inferred, however, that the statutory formalities were observed (fols. 114 to 118).

On his cross-examination, he shows, that *in letter and*

spirit there was, in fact, no compliance whatever with any of the statutory requirements.

The witness states that about or two three weeks before the execution of the will, Henry Hermann called, and told him Mr. Rollwagen wanted to see him. The witness did not go at once, but upon Hermann calling the second time, he went to see Mr. Rollwagen. The second time Hermann called, the witness said, "he wanted to know why I didn't come." (Fols. 126 to 128.)

When he saw Mr. Rollwagen he at once observed his condition. Hestified :

" Q. Was he somewhat feeble ?

" A. Yes, sir ; he could not move." (Fol. 129.)

He found only Lena and Mr. Rollwagen in the room. Lena expected him. He testified :

" Q. She was expecting you, was she not, from what she said ?

" A. Why, yes, because I sent up word I would be there that morning—(fols. 135-6).

Bellesheim asked Rollwagen what he wanted to see him about (fol. 130).

He and Lena were standing close by Rollwagen at this time (fol. 141).

Lena repeated to Rollwagen what the witness stated ; Rollwagen said nothing which the witness could understand. He testified :

" Q. Did he (Rollwagen) make a noise with his lips ?

" A. Yes, sir.

" Q. Could you tell anything more than that he made a noise with his lips ?

" A. That is all I can tell. * * * *

" Q. You *could not understand one word* ?

" A. I *could not*.

" Q. Although the articulation was loud enough ?

" A. Loud enough for me to hear.

" Q. If he had pronounced the words, the articulation was loud enough for you to hear ?

" A. Yes, sir.

" Q. And to understand ?

" A. Yes, sir." (Fols. 149 and 150.)

Lena then went in another room, and returned with a will which some one else had drawn, and said to the witness :

" Here is the Will which Mr. Rosenstein drew for Mr. Rollwagen. Mr. Rollwagen wants to give me instead of the house which he sold the other house which he bought, and he does not want to have Mr. Beers as executor in the will. In all other particulars it should remain as it was.

" Q. Then when Mrs. Rollwagen told you that, did she say anything more on the subject ?

" A. No, she did not.

" Q. Did you make any reply to her ?

" A. No, sir, I did not." (Fols. 155-6.)

The witness says he repeated to Mr. Rollwagen what Lena said. He testified on this subject as follows :

" Q. You said that to Rollwagen ?

" A. Yes, sir.

" Q. Did Rollwagen say anything in reply ?

" A. He nodded to me and made 'ng,' [making a nasal sound by way of illustration.]

" Q. He nodded and made a guttural noise ?

" A. Yes, sir.

" Q. In the guttural noise which issued from his lips, you could not tell a word he said ?

" A. No. * * *

" Q. When you repeated what Mrs. Rollwagen said, you saw his (Rollwagen's) head nod, and he made this sound ?

" A. Yes, sir.

" Q. Was that all Mr. Rollwagen did or said on the subject of his instructions, for you to draw his will at that time ?

" A. Yes, sir. (Fol. 159 to 161.)

* * * * *

" Q. Then if I understand you, you have had no communication whatever with Mr. Rollwagen, except as his wishes were interpreted, or explained to you by Mrs. Rollwagen ; that is the substance of it ?

" A. Yes, sir, that is the substance, and my explaining it from the will.

" Q. That you have given ?

" A. Yes, sir.

" Q. On my examination you have testified to all that was said by either Mr. or Mrs. Rollwagen at that interview, have you not ?

" A. Yes, sir." (Fol. 161-3)

Thus it will be perceived, that Lena gave all the instructions in regard to the will, and transacted the entire business. Rollwagen had nothing to do with the matter, and took no part in it whatever.

Mr. Bellesheim, on cross-examination, stated in the most direct and positive manner that Mr. Rollwagen, at the time of the execution of the will said nothing whatever, which he, the witness, did or could understand.

The witness read over the will. What followed appears by the following extract from his evidence.

" Q. State the precise words that you used to Mr. Rollwagen ?

" A. Mr. Rollwagen, do you acknowledge this to be your last will and testament ?

" Q. Go on ?

" A. He nodded as it I said before, and issued this sound.

" Q. State the sound he made—which issued from his lips—repeat it ?

" A. 'ng,' (the witness accompanies the utterance of the sound with a nod.)

" Q. *Is that all he did or said ?*

" *Yes, sir.*" (Fol. 201-2.)

The witness then undertook to say, that Mr. Rollwagen handed the will to Dr. Golden for him to read ; but when he was compelled to particularize precisely what Rollwagen did, it clearly appeared that nothing of this kind occurred. When asked in what way Rollwagen handed the will to Dr. Golden, the witness answered.

" He made motions to the Doctor."

" Q. What motions did he make ?—describe them ?

"A. With his hand, gave him the will and made a motion. (Fol. 203.) [It appears by the evidence of Dr. Golden, that all Rollwagen did in this matter was to move one hand without in any way touching the will.]

Upon the subject of whether Dr. Golden read the will, the witness testified.

"Q. * what did the Doctor do or say?

"A. The doctor read it over.

"Q. *Aloud?*

"A. No.

"Q. The doctor had it in his hand and seemed to be reading it over, is that what you mean?

"A. Yes, sir.

"Q. He didn't read it *aloud*?

"A. *No, sir.*" (Fol. 204.)

The witness here attempted to say that the doctor told Rollwagen it was all right. When further examined upon this point he conceded that he did not understand what the doctor said. He testified :

"Q. Did you understand, at the time, the words used by Dr. Goulden?

"A. Nothing more than the impression I got; I cannot give the words.

"Q. You know nothing as to the words, except the inference you drew?

"A. Yes, sir.

"Q. Did those words have any meaning of themselves that *you understood, at the time?*

"A. No, sir.

"Q. The words did not?

"A. No, sir.

"Q. You drew the inference from Dr. Goulden, and from the motions he made?

"A. Yes, sir.

"Q. And not from the words?

"A. Not from his words." (Fol. 206.)

The witness says that after this he "asked Mr. Rollwagen whether he wanted the persons present to sign their names as witnesses to the will." On this subject he testified :

"Q. Give your own words as you used them?

"A. I said, 'Mr. Rollwagen, do you want these two gentlemen and myself to sign our names as witnesses to this will?'

"Q. Did you speak that in your ordinary tone of voice?

"A. Just the same as I speak them now [a clear and distinct tone].

"Q. About how far were you from Mr. Rollwagen?

"A. We were sitting then right around with him.

"Q. You were within five or six feet of him?

"A. Not as far as that; *about two or three feet*.

"Q. What did Mr. Rollwagen say when you said that?

"A. The same—and nodded.

"Q. He nodded, and gave the same sound that you have already described?

"A. Yes, sir.

"Q. *He said no word or words that you could understand, did he?*

"A. *No, sir.* (Fols. 207–8.)

Mr. Bellesheim's evidence in regard to the codicil is but a repetition of his testimony respecting the will. Henry Hermann came twice for him before he succeeded in getting him to attend at Mr. Rollwagen's for the purpose of receiving instructions for drawing the codicil (fols. 254–256.) Upon his arrival there he found Mr. Rollwagen and an old lady, whom he supposed to be Mrs. Herrmann, the mother of Lena (fol. 258). Bellesheim spoke to Mr. Rollwagen and said "How do you do?" Bellesheim says that Rollwagen "tried to talk *but he could not*" (fol 260.). He testified:

"Q. Do you not mean that he made a noise?—Did he make a noise?

"A. Yes, sir.

"Q. What kind of a noise?

"A. The same as before, when he nodded.

"Q. He made the same noise as he had before, when he nodded?

"A. Yes, sir.

"Q. Did he make any other or different noise than that?

"A. He did not.

"Q. Did he say one word?

"A. No; unless you call that a word.

"Q. He made a noise?"

"A. Yes, sir." (Fols. 260-1.)

The witness waited until Lena, who was out, returned (fol. 264.). The witness says he then spoke to her. He testified:

"Q. What did you say?"

"A. I told her I was here to see what was wanted. She told me that Mr. Rollwagen wanted to have some alteration in his Will. (Fol. 266.)

Rollwagen said nothing. Lena professed to talk with him, and to tell Mr. Bellesheim what he (Rollwagen) said. She stated to Mr. Bellesheim:

"He (Rollwagen) wants me to get four houses in Avenue A, and in case I shall get a child from him, it shall go in even shares with the other children." (Fol. 267.)

At this time Lena told Mr. Bellesheim the numbers of the houses and lots in Avenue A which were to be given to her in the codicil (fol. 270). These are the same houses specified in the codicil offered for probate. The will was given to Mr. Bellesheim in an envelope. He made a memorandum on the envelope, "of the houses and numbers." He testified:

"I showed the houses and numbers to Mr. Rollwagen on the envelope; he didn't say anything. *He could not say anything*, but he nodded the same as before. * * *

"Q. Was there anything on the envelope—any memorandum about the child?"

"A. *No, merely the numbers of the houses.*

"Q. Nothing about the child?"

"A. Nothing about the child." (Fol. 272.)

It is proved throughout the case that Mr. Rollwagen could not read either print or writing. This evidence will be cited and referred to more particularly hereafter.

Between the time that Lena gave Bellesheim the instructions for drawing the codicil and the time of its execution, Hermann called for him several times. (Fol. 275.)

Hermann came to know what time Mr. Bellesheim would

be at Mr. Rollwagen's residence with the codicil. Bellesheim testified:

"Q. Did he come there to ascertain what time you were to be at Mr. Rollwagen's with the codicil?

"A. Yes, sir.

"Q. When did he do that?—how long before the codicil was executed?

"A. A few days before, I think.

"Q. Was the time then appointed when you should go to him?

"A. Yes, sir.

"Q. The time when you were going to Mr. Rollwagen's to have it signed?

"A. Yes." (Fols. 276-7.)

[Henry Hermann testified that he knew nothing about the codicil until some time after it was signed. Fol.]

On the 5th of September Bellesheim went to Mr. Rollwagen's house to superintend the execution of the codicil. He testified as follows:

"Q. Do you not remember meeting her (Lena) in the hall?

"A. I think she opened the door for me—yes.

"Q. And let you in?

"A. Yes, sir.

"Q. Did she say anything to you in reply to your 'good morning,' as she saw you?

"A. I think she told me that the other gentlemen were up-stairs.

"Q. What other gentlemen?

"A. Mr. Theisz and Dr. Goulden." (Fol. 279.)

* * * *

"Q. Was she in the room with Mr. Rollwagen when you got up there?

"A. *I don't remember.*

"Q. Who were there when you arrived?

"A. Dr. Golden, Mr. Theiss and Mr. Rollwagen.

"Q. And Mr. Henry Hermann?

"A. Mr. Henry Hermann. (Fol. 281.)

The witness says he then read the codicil. (Fol. 283.) He testified :

“ Q. Where were you standing at that time with reference to Mr. Rollwagen ?

“ A. Right next to Mr. Rollwagen,

“ Q. How near—*near enough to touch him* ?

“ A. Yes, sir.

“ Q. Where were they ?

“ A. They were standing around, all near enough too.” (Fol. 284.)

The witness says he proceeded to read the codicil. He testified :

“ Q. After you had read it what then ?

“ A. Then I asked Mr. ——

“ Q. In English—did you speak to Mr. Rollwagen in English ?

“ A. Yes, sir.

“ Q. Give the words ?

“ A. I said, Mr. Rollwagen, do you acknowledge this to be a codicil to your will.

“ Q. What did he do ?

“ A. He nodded the same as before.

“ Q. And made the same sound you have described when he signed the will ?

“ A. Yes, sir.” (Fols. 284-5.)

“ The witness says Dr. Golden took the codicil and appeared to read it over.” (Fol. 286.)

The witness says that then a book was brought in and the codicil placed upon it for Mr. Rollwagen to sign. The witness says :

“ I asked him whether this was a codicil.”

“ Q. State your words ?

“ A. I said : ‘ Mr. Rollwagen, do you acknowledge this to be a codicil to your last will and testament,’ and he nodded the same as before.

“ Q. He nodded his head and made the same sound, did he, that you have described him as making at the time of signing the will ?

“ A. Yes, sir.

"Q. Then after he nodded his head and made that sound, what next was done ?

"A. I said to him, 'Mr. Rollwagen, do you want these two gentlemen here present and myself to sign their names as witnesses to it ?'

"Q. What did he say, or what did he do, rather ?

"A. The same, and nodded.

"Q. He made the same nod and the same sound ?

"A. Yes, sir.

"Q. What then ?

"A. The witnesses then signed their names to the codicil. * * *

"Q. He did not say anything except to make the peculiar sound which you have described ?

"A. That is all, I think. * * *

"Q. At the time he signed this you said, 'Mr. Rollwagen, do you republish your former will ?'

"A. And the answer was the same.

"Q. He made a nod, and made the same sound already described ?

"A. Yes, sir ; that is it.

"Q. Go on—what then ?

"A. That was about all, I guess.

"Q. You have now told all that was said and done by Mr. Rollwagen, you and Theiss and Dr. Golden on that occasion, have you ?

"A. I guess so.

"Q. *You are sure you have told all that was said and done by you four so far as that codicil is concerned ?*

"A. Yes, sir ; as far as I recollect." (Fols. 297 to 301.)

The witness states in substance that as far as the will and codicil were concerned, he did the talking, and that the other two witnesses, Theiss and Dr. Golden, had nothing to say. He testified :

"Q. *Did the other witnesses say anything whatever during the time you were there in relation to the will and codicil, or anything bearing upon the subject of either, that you remember ?*

"A. No, sir.

"Q. *Nothing whatever ?*

"No, sir." (Fol. 304.)

After the will was executed Bellesheim says Rollwagen made some motion, upon which Lena asked him (the witness) what she owed him. He mentioned the amount of his bill, which she paid. (Fols. 312 and 313.)

Bellesheim says Lena paid him for drawing the codicil after it was executed. (Fol. 314.)

Mr. Bellesheim says that Rollwagen, at the time the will was signed, did not have on spectacles. (Fol. 368.)

This witness, on his direct-examination, stated that he considered Mr. Rollwagen of sound mind at the time of the execution of the will and codicil.

Upon the cross-examination he testified on this subject as follows :

“ Q. You have stated that his (Rollwagen’s) mental condition was good, but you were not an expert. Have you any other fact upon which you base that opinion than the mere fact that he nodded and gave this guttural sound two or three different—

“ A. No ; I—

“ Q. Wait one moment ?

“ A. I say no because I am not an expert. I cannot give another reason.

“ That is the only fact ?

“ A. Yes, sir.” (Fol. 373.)

I will now invite your attention to the testimony of Dr. Golden, another of the subscribing witnesses to both will and codicil :

On his direct-examination he testified that Mr. Rollwagen shortly before the 17th of June, 1873, asked him to attend and witness the execution of the will ; that in pursuance of such request he did attend. He testified that at the time of the execution of the instrument, Theiss, Bellesheim and himself were present ; that Bellesheim read over the will and asked Mr. Rollwagen if he acknowledged it to be his last will and testament, to which he (Rollwagen) responded “ yes ” ; that the decedent then asked him (Dr. Golden), Mr. Bellesheim and Mr. Theiss to become subscribing witnesses ; that

thereupon the three signed their names as witnesses. (Fols. 769, 770 and 772.)

In relation to the codicil, Dr. Golden testified that the day before it was executed Rollwagen asked him to attend as a subscribing witness. (Fol. 773.)

At the time of the execution of this instrument, Dr. Golden says that Mr. Bellesheim read it over to him; that Mr. Rollwagen asked him (Dr. Golden) to read it, which he did; and afterwards Bellesheim asked Rollwagen if that was his codicil, to which he responded "yes;" that afterwards Rollwagen signed the will, and he, Mr. Theiss and Bellesheim signed their names as subscribing witnesses. (Fols. 773 to 776.)

On the cross-examination Dr. Golden testified to an entirely different state of facts. He stated that he had attended Lena and the Hermann family for years before she commenced living with the decedent in 1869, and that from attending Lena professionally he became acquainted with Rollwagen.

He distinctly admitted that Rollwagen, so far from asking him the day before the will was executed, to attend as a subscribing witness, said nothing whatever to him upon that subject.

On this occasion, the witness having been sent for, attended at Mr. Rollwagen's residence, and charged for his attendance *as a professional visit*. When pressed closely as to whether Rollwagen, on that occasion, said anything, he prevaricated for a considerable time.

He stated that Lena talked to Rollwagen. The witness made a strong effort to have it appear that Rollwagen spoke, if not to him, at all events to Lena. The witness endeavored to convey the idea, by his evidence, that Rollwagen spoke to him (fols. 866 to 876).

The witness, when pressed on cross-examination to state the facts precisely as they occurred, was forced to admit that Rollwagen said nothing to him, and, as far as he

heard, Rollwagen said nothing to Lena. The witness testified :

“ Q. Did you hear, during that interview, one word said between Rollwagen and Magdalena ?

“ A. No. I did not hear it. I didn't see him speak to her, &c. * * * * She (Lena) told me I could come on a certain day, because Mr. Rollwagen wanted to make his will, and would like me to be a witness to it.

“ Q. What did you say ?

“ A. I said, ‘ Yes, I will come. ’ ” (Fols. 876 to 878.)

The witness stated it was the next day after this interview that the will was executed (fol. 878).

Thus it will be perceived that the request that he should become a witness was made by Lena and not by Rollwagen. When cross-examined in regard to the facts attending the execution of the will, the witness, for a time, adhered, on his cross-examination, to the statement made by him on the direct, namely, that Rollwagen, in express words spoken by him, acknowledged the will to be his, and requested those present to sign as witnesses. Dr. Goulden, however, very soon retracted his entire statement, and testified to the contrary. The following is an extract from his evidence :

“ Q. What next was said or done ?

“ A. Mr. Bellesheim asked Mr. Rollwagen if he wanted us to sign the will.

“ Q. He said, what ?

“ A. To Mr. Rollwagen first——

“ Q. He said, what ?

“ A. Well, Bellesheim asked Mr. Rollwagen if he wanted to sign the will.

“ Q. What did Rollwagen say ?

“ A. He bowed his head.

“ Q. Did he say anything ?

“ A. No, he did not say anything—he said, yes.

“ Q. Did he say ‘ Yes ’ at that time ?

“ A. He made ‘ m ’ with his head [a nasal sound made with the lips closed].

“ Q. Did you hear him say the word ‘ Yes ’ ?

"A. I did not hear him. He said, 'm. He did not really say 'Yes'; he said, 'm.'"

The witness acknowledged that Mr. Rollwagen did not ask him and Mr. Theiss to sign as witnesses, but, on the contrary, he (Rollwagen) said nothing whatever on the subject. The witness testified :

"Q. Do you mean to say that in express words Mr. Rollwagen asked you and Theiss to be witnesses ?

"A. No, sir.

"Q. *Did Mr. Rollwagen say one word on that subject ?*

"A. No.

"Q. Did he make any motion or gesture of any kind ?

"A. He made——

"Q. He made, what ?

"A. He moved [the witness moves his hand from the table, and at the same time nods his head].

"Q. Mr. Rollwagen bowed his head. At that time Mr. Rollwagen nodded and bowed his head he made the gesture you have described ?

"A. Yes, sir, he bowed a little.

"Q. The next after that, what was done or said by anybody ?

"A. After what was done ?

"Q. After what you have just stated—after Mr. Rollwagen made that gesture and nodded his head, what was said or done by anybody ?

"A. We signed the will.

"Q. Who did ?

"A. Mr. Bellesheim, Theiss and myself." (Fols. 910 and 911.)

The witness had stated that Mr. Rollwagen asked him to read the will, yet such was not the fact, as will appear by the following extract from his testimony :

"Q. What next occurred ?

"A. Mr. Rollwagen asked me to read him the will.

"Q. Asked you to read him the will ?

"A. Yes, sir.

"Q. What did he say—repeat his words ?

"A. He showed me the will—held it before me, and showed me with his fingers that I should read it.

* * * * *

"Q. Did Mr. Rollwagen, when you say he wanted you to read the will, utter or speak a word of any kind ?

"A. No.

"Q. Then by the use of words he did not tell you to examine or read the will ?

"A. No ; he just showed this way [making a movement with his hand from his person towards the stenographer's table]. (Fols. 887-8.)

Thus it will be perceived that this witness, in the most positive and emphatic manner, stated that during the entire execution of the will Rollwagen said nothing which could be or was understood by any of those present.

In relation to the codicil, the witness testified, on cross-examination, that two days before it was executed he was sent for to call at Mr. Rollwagen's residence, which he accordingly did (fol. 926). On that occasion Rollwagen said nothing. The business was transacted entirely by Lena, as will appear by the following extracts from Dr. Goulden's cross-examination :

"Q. What did she [Lena] say to you ?

"A. That Mr. Rollwagen wanted me to come two days after and sign his codicil ; that he wanted to make his will.

"Q. What did you say ?

"A. I said yes.

"Q. Is that all the conversation you had on that occasion ?

"A. All the conversation.

"Q. Then you left ?

"A. Yes, sir. * * * *

"Q. You did not hear Mr. Rollwagen say a word on that occasion ?

"A. I did not ; I could not hear it.

"Q. You could not understand a word he said ?

"A. No, I did not.

"Q. Then did you go two days afterwards to witness the codicil ?

"A. Yes, sir." (Fols. 928 to 930.)

When the codicil was executed, Rollwagen said nothing whatever.

On this subject Dr. Goulden testified as follows :

"Q. What did you hear Bellesheim say to him [Rollwagen] ? You say Bellesheim read the codicil after you got there ?

"A. Yes, sir ; when I came in.

"Q. Did he read it all through ?

"A. He asked him to read it.

"Q. Who asked him ?

"A. Mr. Bellesheim asked Rollwagen if he wanted him to read the codicil.

"Q. What did Rollwagen do ?

"A. He nodded.

"Q. *Did he say anything before he nodded his head ?*

"A. *No, sir.*

"Q. Did he make any noise with his lips whatever, or did he move his lips ?

"A. He made a little movement.

"Q. Did he make an articulate noise with his lips loud enough for you to hear ?

"A. No.

"Q. After Bellesheim had asked him that, and he nodded his head, what was done ?

"A. Mr. Bellesheim did read it.

"Q. After Mr. Bellesheim read it, what did Mr. Bellesheim say, if anything ?

"A. He asked him if that was what he wanted ?

"Q. What did Mr. Rollwagen say ?

"A. He made the same.

"Q. He nodded ?

"A. Yes.

"Q. He made no noise with the lips that you could hear ?

"A. No.

"Q. *He said nothing ?*

"A. *No.*" (Fols. 932 to 934.)

The witness had previously testified that Mr. Rollwagen asked him (Dr. Goulden) to read the codicil. This turns out to be a mere inference of the witness from certain motions made by Rollwagen.

Dr. Goulden testified as follows :

"Q. What next ?

"A. He made the same movement to me, that he wanted me to read it.

"Q. Tell what Mr. Rollwagen did, if anything.

"A. He showed me just herewith his hand [showing a movement of his right hand in the direction of the stenographer's table in front of the witness].

"Q. Tell me what he (Rollwagen) did.

"A. He did that, and moved his arm so.

"Q. He moved his fingers ?

"A. And his arm too.

"Q. He moved his arm and his fingers ?

"A. Yes, sir.

"Q. In what way ?

"A. In this way [showing a movement of the right hand in an upward and downward curved line, from his person towards the table.]

"Q. Was his finger on the table at that time ?

"A. No, sir, it was not on the table.

"Q. Which hand did he use in making that motion ?

"A. His right hand.

"Q. *Did his fingers touch the codicil ?*

"A. *No, he did not touch it.*

"Q. Then all he did was to move his arm and fingers as you have described ?

"A. Yes, sir.

"Q. He did nothing more than that ; and when you said he wanted you to read it, or something to that effect, that was all you meant that he did so do ?

"A. Yes, I thought he meant that.

"Q. Rollwagen didn't say so, did he ?

"A. No, sir." (Fols. 934 to 937.)

In respect to what was done after the codicil was read, Dr. Golden testified as follows :

"Q. Then he (Rollwagen) moved his right hand ?

"A. Yes, sir.

"Q. That was all he did ?

"A. Yes, sir.

"Q. The right hand of Mr. Rollwagen moved in the direction of you or in the direction of the table ?

"A. No ; in the direction of the table.

"Q. That was all Mr. Rollwagen did ?

"A. Yes, sir.

"Q. He said nothing, whatever ?

"A. He commenced to speak.

"Q. Did he articulate one word ?

"A. He made just 'ngy, ngy, ngy,' [a nasal sound, combined with the sound of y before a vowel].

"Q. *He said nothing ?*

"A. *He did not say anything.*

"Q. You have now told all Mr. Rollwagen did at that time, have you not ?

"A. Yes, sir, as much as I can remember." (Fols. 1018 and 1019.)

This witness also says that Mr. Rollwagen did not wear spectacles at the time of signing of either the will or codicil (fol. 1038).

[The Court here adjourned until the following morning at half-past 10 o'clock, at which time Mr. Clinton proceeded as follows :]

In the discussion of my third point yesterday, upon the testimony of Mr. Bellesheim and Dr. Goulden, I showed :

1st.—That at the time Bellesheim, the lawyer, received the instructions for drawing both the will and the codicil, Rollwagen did not speak a word which Bellesheim could understand. The instructions were given by Lena, and by her alone, in the presence of Rollwagen.

2nd.—When Dr. Goulden was requested to attend and officiate as a subscribing witness to the will and codicil, Rollwagen, although present, did not speak or utter a word. The request that he should act as a subscribing witness was made by Lena in Rollwagen's presence.

3rd.—At the time of the execution of the will, and at the time of the execution of the codicil, Rollwagen said nothing whatever which any of those present could understand.

In other words, in respect to the instructions for drawing the will and codicil, and in respect to the execution of these papers, Rollwagen took no part whatever.

I will now refer for a few moments to the testimony of the third subscribing witness, John Theiss, the undertaker ; and I will call the attention of the Court to the fact

that all of these witnesses were engaged by Lena. In this connection it is well to bear in mind that Mr. Geissenheimer had been the lawyer of the decedent, as I have already stated, for nearly thirty years. We offered to prove that he was sent for to draw a will, and refused on the ground that he did not think the decedent was in a proper condition to make a will; or, at all events, that he could not communicate his intentions on that subject in any intelligible manner. An objection was interposed and sustained. The case took such a turn afterwards that we did not deem it necessary to re-call Mr. Geissenheimer, or to go into that subject; and therefore we derived no benefit whatever, and claim none, for that offer.

There is however this fact, that if Mr. Rollwagen had intended to make a will, he would have sent to Mr. Geissenheimer for that purpose. It is in evidence that Mr. Geissenheimer had drawn one or more wills for him; I think two or three, in former years. Lena, however, secured Mr. Bellesheim who up to that time since his own admission to the bar, as far as I am aware, had done no professional business for Mr. Rollwagen. It did transpire in the evidence, that he had drawn some leases many years ago, which was anterior in point of time to his admission to the bar; that during the time he was in the real estate business he had met Mr. Rollwagen, and there had some few transactions of a not very important character between them. It does not appear that he was Mr. Rollwagen's lawyer in any sense of the term. Doctor Goulden was Lena's physician, and the physician of the Hermann family for many years. The precise dates are given in his evidence. He first made (according to his own evidence) the acquaintance of Mr. Rollwagen, by visiting Lena professionally. It was as the professional attendant if not the friend of Lena, and the Hermann family that he appeared in this case.

Although three witnesses on their direct examination testified distinctly and specifically to the observance in form, of all the requirements of the statute with reference to the

execution of wills, yet upon the cross-examination, two out of the three recanted their statements on the direct evidence; and testified as I have stated, that so far from Mr. Rollwagen acknowledging the will and codicil to be his, he said nothing upon the subject; so far from his requesting them to be witnesses, he remained silent as far as speech is concerned during the interviews, at which both instruments were executed. So that while I find it difficult to reconcile the statements of Doctor Goulden on his direct-examination with those made by him on his cross-examination, yet the fact appears most distinctly by the evidence of those two witnesses, that within the meaning of the law none of the statutory formalities were observed, for the reason that Mr. Rollwagen could not—at all events did not—speak, and from that fact in connection with other undisputed facts we infer that he could not. Mr. Bellesheim's evidence was more frank than that of either of the other witnesses. In a portion of his direct-examination the idea did appear that during a part of the time he was with Mr. Rollwagen the latter did not speak and Lena interpreted. But in respect to the other two subscribing witnesses they swear in the most distinct and emphatic manner that Mr. Rollwagen talked; they mention the precise words that he used, but afterwards they state that those words which they had put into his mouth were mere inferences drawn from the fact of his nodding and from certain signs which he made. I can reconcile Mr. Bellesheim's evidence with the idea that he did not mean on his direct-examination to swear that Mr. Rollwagen in words, said that which he imputed to him, but that those were his inferences. Mr. Bellesheim did what no lawyer ever ought to do; instead of giving the plain unvarnished facts, he swore simply to legal conclusions at which he had arrived. The testimony, however, of Dr. Goulden, in my judgment cannot be reconciled. On his direct-examination, as appeared from the extracts, from his evidence which my associate (Mr. Langbein) read during the latter part of yesterday, he testified both ways. He stated that Mr. Roll-

wagen himself pronounced certain words—that they issued from the lips of Mr. Rollwagen himself. When your Honor comes to read over the evidence you will find in pursuing it, page after page, that for a long time after the cross-examination commenced, this witness adhered to the same position, but finally when he was involved in a mass of complications and contradictions, and had gotten into an inextricable maze, where he could not see the way through, he finally made a frank and unqualified confession; he stated the facts precisely as they were. It was by degrees only that I was enabled to elicit from him the real facts of the case. It will be a curiosity to your Honor, as it would be to any legal gentleman to track that cross-examination through, and to see by what small degrees I was enabled to elucidate the truth from that witness. But, finally, after getting fact after fact from him, with a frankness that was as remarkable as it was surprising, he admitted the whole truth in the particular which I have now discussed. He stated in the latter part of his examination, in the most direct and positive manner, that Mr. Rollwagen said nothing during the whole interviews. Suppose that Doctor Goulden is a reliable witness. If so, he proves that nothing was said by the decedent. If he were an unreliable witness, or if two out of the three witnesses are unreliable, then the case of the proponents would break down of its own weight. We have, however, established upon the testimony of two of three witnesses, that a state of facts existed, upon which, if un rebutted, as in this case, the law adjudges both instruments—the Will and Codicil—to be absolutely void.

Mr. Theisz adhered substantially to the same story throughout. The reason of the discrepancy of some of these witnesses was, undoubtedly, that after the examination of the first witness had proceeded a very short way, the other witnesses were excluded from the room, and from that time on the subscribing witnesses while one of their number was being examined were not permitted to hear the evidence as

given. The result of that is while these two agree in respect to Mr. Rollwagen not having said anything, the three witnesses disagreed with each other in regard to almost every material or important fact which transpired during that interview. If the case depended upon the consistency and credibility of the evidence of the three subscribing witnesses, why upon various points I would show that they were so hostile to each other, the statements made by them were so irreconcilable one with the other, that no court could pronounce any judgment based upon their testimony. However, as that is not at all necessary, and as two out of the three subscribing witnesses prove the facts of our case so far as this branch of it is concerned, I shall omit many comments on their evidence which otherwise it would be my duty to make.

Mr. Theisz, as I have stated, adhered to the same statement throughout. While he became involved in the most inextricable confusion in regard to other matters, yet in respect to Mr. Rollwagen talking, sometimes above and sometimes in a whisper, he was substantially consistent. There were, however, certain features of this evidence which are characterized by such an entire improbability and incredibility, that no court could give a judgment upon it as it appears in this case.

There are various tests to which the testimony of witnesses are liable to be subjected on cross-examination. If they are candid and truthful witnesses, a cross-examination will frequently bring out the truth in bolder relief than does the direct-examination. If, however, the witness has learned his story, he is apt to be consistent in the main matter, and inconsistent with respect to other matters, because with reference to them he does not know what questions will be asked, and therefore he is not prepared.

There was one subject upon which Mr. Theisz was extremely sensitive, and that was in reference to his relations with Lena. When he was asked as to the manner in which

he became acquainted with her he stated that Mr. Rollwagen introduced him. He says that Mr. Rollwagen told him that Lena was his wife. At that stage of the case the witness undoubtedly supposed that in this case this court would have to decide (as it will not necessarily have to do), the specific question whether Lena was married to the deceased. Supposing that to be an important question in the case this witness came prepared to swear to the declarations of the decedent (well knowing that he being dead could not contradict him)—to swear to such declarations as would in his judgment establish the point in issue. He stated that he was introduced by Mr. Rollwagen to Lena; that Rollwagen told him that Lena was his wife; but he stated that he could not remember when Rollwagen so told him. If such a conversation occurred it would be easy for the witness to locate it within at least a few months, or a year or so. But when the test is applied to this witness, it is very evident that he has manufactured his evidence, because the manufacturers brand appears upon his testimony throughout. He testified :

“ Q. When did he tell you that ?

“ A. I cannot remember that.

“ Q. What year was it ?

“ A. He told me ; that is all.” (Fol. 429.)

The evident intention of the witness to prevaricate plainly appears. He did not wish to go into particulars. He came here to swear to that fact, and when he had sworn to it, he thought that sufficient. He further testified :

“ Q. Was it in 1872 ?

“ A. I do not know ?

“ Q. In 1873 ?

“ A. I do not know.

“ Q. In 1874 ?

“ A. I do not know.

“ Q. In 1876 ?

“ A. I do not know.

“ Q. Was it in the year 1900 ?

“ A. I do not know.” (Fols. 429-30.)

When we came to that point we might have supposed that the witness was confused, and that he did not understand the questions put to him ; and yet, as I will show you, he did understand those questions, and deliberately made those answers, because he saw fit to palter with his oath, and because he thought that it was a piece of impertinence for him to be asked the particulars in regard to a conversation which we contend never occurred. Had it occurred, he would not have been so sensitive. From the answers of the witness, one would have supposed that he did not understand the questions, and yet the following extract from his evidence will show that he did.

“ Q. Do you know what year it is now ?

“ A. I believe so.

“ Q. What year is it ?

“ A. What this year is ?

“ Q. Yes, sir.

“ A. I believe it is the year 1873.” (Fol. 430.)

Those questions and answers follow continuously, thus you perceive that this witness did not intend to answer, as I contend, truthfully, except so far as in his capriciousness he might see fit. I asked him again, after he had told what year we were then in :

“ Q. Do you not know whether he called her his wife in that year ?

“ A. No, sir. * *

“ Q. You do not ?

“ A. No, sir.” (Fol. 430.)

After the witness has had his attention called to the fact substantially that he had been testifying that he did not know whether this conversation was in the next century or not, he is even then just as oblivious with regard to the particulars of the conversation as before. He was asked when he first saw Lena, and he answered that he never saw her until she came to live with Mr. Rollwagen in 1869. He then stated that she had visited his wife's family, and that

three or four years had elapsed between that time and the period when the witness was upon the stand. Whenever he was asked in regard to Lena, as I have said, he manifested extraordinary sensitiveness, and he would invariably, without any occasion for it, seek to bring into the case his own wife, Mrs. Theiss. The witness stated that Lena had visited his family. I then asked him these questions:

“Q. When did she again visit your family ?

“A. I do not know.

“Q. Tell within two or three years ?

“A. I do not know.

“Q. Tell within five years ?

“A. I do not know.

“Q. Tell within fifteen years ?

“A. I stated I do not know.” (Fol. 432.)

Although he had stated that the acquaintance he had with Lena extended only over the period of three or four years, he saw fit to answer those questions in the way he did. One would have thought from such extraordinary evidence, that it was given on account of some peculiar bias the witness might have in reference to the case; and yet, he, like all the witnesses that do the swearing for the proponents, testified that he felt no interest whatever in the case, and cared nothing whatever about it.

Then again, when he was asked the particulars in regard to Mr. Rollwagen lifting the pen to sign the will and codicil, he said in reference to the will that “He lifted the pen just as freely as any person would in good health” (fol. 459). We know that that is untrue for the reason stated yesterday—that it was a physical impossibility that he could do it. Yet the witness states that Mr. Rollwagen used his right arm in handling the pen as easily and as freely as anybody could. We know that those facts are untrue. He says further that Mr. Rollwagen wrote freely and without difficulty. Then again I subjected his recollection to certain tests, and inasmuch as he drew on his imagination instead of his memory in regard to most of the facts in the case, he was sadly out of joint. In respect to the execution

of the will, I asked him about the table on which Mr. Rollwagen signed the will, and he gave very extraordinary evidence on that subject. He testified :

“Q. How high was that table ?

“A. I cannot tell. * * *

“Q. Was it six feet high ?

“A. I cannot tell if it was nine or twelve feet high.

“Q. Was it nine or twelve feet high ?

“A. I cannot tell you.” (Fols. 521-2.)

Of course, unless the witness misunderstood those questions, we know that he could not have testified with fairness and candor ; and the context shows that he did understand them. But whenever he was not in the humor to answer the questions, or for some reason best known to himself preferred not to do so, he did not scruple at violating the obligation of his oath ; for it is not to be conceived that any witness of sufficient intelligence to go upon the stand would answer such questions in the way he did if he were speaking with truthfulness and candor. For instance, when he is asked whether a decrepid old man with his feet on the floor, sitting in a chair, at a table, is writing on a table which is twelve feet high—the mere statement of the proposition shows that no witness could answer such a question in the affirmative, or assert his inability to answer it, without stating that which was absolutely absurd. This witness not only does not answer with candor in respect to these facts, but he gives just such evidence as a reckless witness would give, who for some purpose was so complicated in regard to facts ; or for some reason was willing to swear to the main fact, but unwilling to encumber his testimony with any details, which might result in testing his correctness or incorrectness.

It is a little extraordinary that this witness is actually brought here to testify that Mr. Rollwagen was of a sound mind. Yet he does so testify on his direct examination. It was, legally speaking, a proper question to put to any subscribing witness to an alleged will. This is a good illustra-

tion of how much the opinion of the witnesses for proponents, as to whether Mr. Rollwagen was rational or not, is worth. This witness who cannot answer the simplest question,—who could only be excused for making these false statements under oath, on the theory that he had not mental capacity for understanding the questions, which it appears he did understand;—this witness is brought here to prove the mental capacity of a man who could not speak at all!

Then again I asked him—he having stated that he made calls at Mr. Rollwagen's house—as follows :

“Q. Did you go to make Lena a social call ?

“A. To make him a call.”

And when I asked him further :

“Q. Did you not go to call on his wife ?”

He answered :

“A. No, sir; I had nothing to do with his wife; I have “my own wife.” (Fol. 584.)

It is very extraordinary that upon a simple question like that being asked the witness, whether he had socially called on the alleged wife of Mr. Rollwagen, he should interpret such a civil question in the way he seems to have done, and especially when the two families were living nearly opposite, and professing to entertain social relations with each other. He answered the question as if the mere fact of his calling implied that it was for purposes not commendable, to say the least.

He also betrays a most remarkable sensitiveness in regard to the child called “Magdalena the younger,” he testified as follows :

“Q. Did you see the child born a few weeks ago ?

“A. Yes, sir, I saw it last week.

“Q. For the first time ?

“A. For the first time.

“Q. Have you seen it since ?

“A. No, sir; Dr. Goulden asked me, I did not like to go “there.

"Q. What had Dr. Goulden to do with it?

"A. He took me along; he said, 'I want to show you her child.'

"Q. Did you notice whom it looked like?

"A. I did not take any notice of that." (Fols. 584-5.)

Dr. Goulden, when asked upon that subject distinctly stated that he did not invite this witness to go. Why Theiss should prevaricate and why he should misstate on a subject of that kind, it is a little difficult to conceive.

I suppose it would not have been proper for us to attempt to prove in this case, that this now celebrated child, "Magdalena the younger," resembled any one in particular. In this case, we did not propose to prove in that way who was its paternal ancestor. If that mode of proof had been open to us, I don't pretend in any way to insinuate who would be recognized as its father, nor whether its resemblance to any particular individual would be so striking, that we would all be ready to exclaim

"Behold! although the print be little, the whole matter

"And copy of the father; eye, nose, lip,

"The trick of *her* frown, *her* forehead, nay the valley,

"The pretty dimples of *her* chin, and cheek; *her* smiles;

"The very mould and frame of hand, nail, finger."

When asked if he had taken an extraordinary interest in this case—an extraordinary interest with reference to the child—in connection with bringing the matter before the clergyman of the church of which he was the undertaker, his testimony is, to say the least, rather peculiar:

"Q. Did you speak to him about the proceeding in the Supreme Court in reference to the child?

"A. No, sir.

"Q. Did you tell him that the bundle of rags had become a living child?

"A. I did not tell him that, but I said, 'I see now there is another muss.' I called him a muss though.

"Q. You called the clergyman a muss?

"A. No, sir, I did not.

"Q. Did you call the clergyman or the baby a muss?

"A. No, sir; being so much talking around there —say-
"ing they thought it was brought up stuffed."

He has proved that there is great deal of scandal, to say the least, in respect to this child, and that may account for some of his sensitiveness on the subject.

"Q. What did you call a muss?

"A. Nobody.

"Q. What was the muss; what did you mean by that?

"A. There was a talk around the neighborhood, around
"the city.

"Q. Do you mean a scandal around?

"A. I don't know what you call it." (Fols. 629-30.)

On another subject this witness's evidence or his memory is very much out of tune. When he was asked in respect to the codicil and the time it was executed, he made a most curious blunder. Had this codicil been executed in the ordinary course of business, and under circumstances not suspicious, as Mr. Theiss was a neighbor of Mr. Rollwagen, and claimed to be on social terms with him and his family he would have been apt to recollect the date on which the transaction occurred. Had there been anything wrong about the matter, he would have been very likely in his confusion, seeking to cover up certain important points, to blunder about matters in regard to which there is no dispute. When he was asked about the execution of the codicil, he testified as follows:

"Q. What month was it?

"A. I think it was in November, or something like that."

That is, the witness states that it was in November, 1873—a month after the decedent died. While of course I would attach not the slightest importance to the witness making a slip in regard to the date if that error stood alone in his testimony, and while I would not consider it even of sufficient importance to call the attention of the Court to it, yet I now refer to it in connection with those other extraordinary statements in his evidence, which go to prove

the correctness of my theory that he came here to swear to certain facts, and did not come with his mind in that candid frame which commends his evidence to the favorable consideration of the Court. His testimony in regard to this child is hardly consistent. He testifies :

“ Q. You say he read something [in the codicil] about a child to come ?

“ A. Yes, sir ; that is what I say.

“ Q. What was it you laughed about ?

“ A. He read that the child should be evenly divided.” (Fol. 678.)

This was certainly the most unfortunate witness I ever knew called to prove the sanity of an alleged testator. He testified :

“ Q. But you were not at all surprised when you heard about the child, were you ?

“ A. No, sir ; I had no interest in it at all.” (Fol. 682.)

This most extraordinary testimony on the part of this witness with reference to that subject constitutes a marked feature in this case. I had not asked him whether he had any interest in the child, but he takes pains to state that he had no interest in it.

However, on another branch of the case, he unwillingly comes to our relief, and that is in respect to some one holding the pen or guiding the hand of Rollwagen at the time of the signature to the will ; on that subject he testified as follows :

“ Q. Will you swear that some person did not have hold of his hand at that time he was signing ?

“ A. I don't know. I can't say that.

“ Q. You can't say whether he did or not ?

“ A. No, sir.” (Fol. 709.)

In regard to the extraordinary contradictions and misstatements upon which I have commented the excuse cannot be made for the witness, Theiss, that he did not understand the English language. He understood it very well, as was evident to any one who heard his testimony. Most

of the witnesses in this case, for the contestants, were Germans. The same remark is true with reference to the witnesses of proponents.

The German witnesses on behalf of the proponents, understood the English language quite as well, if not better, than those called by the contestants.

Your Honor will perceive now that we have the testimony of the three subscribing witnesses that they know not whether somebody else guided Rollwagen's hand at the time he signed the will and codicil. From the testimony cited yesterday I established the fact that the other two witnesses, although they stated on their direct examinations that Rollwagen wrote the signatures to the will and codicil without aid, yet on their cross-examination they admitted that they did not see him sign the instruments. Perhaps their evidence is not altogether reliable on this or on any other subject; still, we have a right to hold the other side to strict responsibility for any statements they made when they understood the questions.

We then have the fact that these three witnesses testify that they do not know whether or not anybody guided the hand of Mr. Rollwagen when these instruments were signed. As I showed yesterday, we have established the fact, by the medical and lay evidence, and by circumstances too numerous to be now enumerated, all pointing one way, and pointing so directly as not to be mistaken,—that it was a physical impossibility for Mr. Rollwagen to sign his name. Therefore the entire evidence that he did sign his name to the will and codicil is, to all intents and purposes, stricken from the case for the purposes of the point I am now arguing. That is to say, we proved it to be an impossibility for him to sign the papers. For if anyone else guided his hand, his hand being paralyzed, or in such a condition that he was unable to write, the hand which professedly guided his wrote the signature, and Mr. Rollwagen, on that state of facts, had no more to do with writing the signature than the pen with which it was written. His

hand if it was used in writing it, was to all intents and purposes an inanimate object, as much as the pen with which the signature was written.

There is another extraordinary fact in this case, and that is that the three subscribing witnesses testify that at the time the will was executed, and at the time the codicil was executed, Lena was not in the room.

Now, had these been proper instruments to be executed, why should such pains be taken that, at the exact moment of execution, she should be out of the room? According to the testimony of them all, she came in afterwards and signalized her appearance by bringing in wine; and one of the witnesses, Mr. Theisz, says that Mr. Rollwagen was so joyful that he gave a toast. He explained afterwards that that toast consisted in saying nothing, but in a sort of waving of the hand, followed by drinking wine. Now, was Lena there? My theory is that she was in the room. Why should those witnesses recollect so distinctly that she was not, unless it was pre-arranged that she should be out of the room at the time of the execution of the papers? I asked Mr. Bellesheim the direct question, and he stated that he had not advised her to be out of the room; that he had given her no advice on that subject. Therefore it would not be apt to strike the memory of these witnesses with force that she was away, unless there was something wrong about the transaction. Why should she be away? She had given instructions for the execution of the will; she had secured a lawyer; she had stated what should be embodied in the will and codicil; she had engaged the witnesses. Why then should she remain out of the room during the time of the execution? It seems to have been from an ignorant idea on her part that her absence established by the evidence, would render the instruments valid, while her presence at the time of the execution of the will and codicil might invalidate them. Therefore, my theory is that it was pre-arranged that it should be proved here that she was absent at that exact point of time.

The theory of the case of proponents is that Rollwagen's only medium of communication with the outside world was Lena; that she could understand what he said although others could not. For the last two years before his death she assumed the office of interpreter, and professed to translate for others what he meant by noises and motions that were unintelligible. If when Bellesheim came to receive instructions for drawing the will and codicil, he could not understand anything which Rollwagen said, and Rollwagen could not understand anything he said, except so far as Lena acted as interpreter; how could Rollwagen on the occasions of the execution of the will and codicil understand what Bellesheim said to him, when he asked him if he published and declared these instruments as his last will and codicil? How could Rollwagen understand, when Bellesheim asked him if he wished himself, Theisz and Dr. Goulden, to become witnesses to his will? A short time before each instrument was drawn, Bellesheim visited Rollwagen, and as has been already shown, could not understand a word which he said, nor could Rollwagen understand anything which Bellesheim said. Lena repeated and professed to explain to Rollwagen what Bellesheim said. When Dr. Goulden called a few days before the execution of each paper, and was requested by Lena to become a subscribing witness, he understood nothing which Rollwagen said. If Dr. Goulden, a few days before the execution of each instrument, could not understand anything which Rollwagen said or attempted to say, how could he understand Rollwagen, or how could Rollwagen understand him at the time of the execution of the will and codicil?

It is extraordinary that the evidence of proponents should show that at the time of the execution of these instruments, the only person through whom Bellesheim, Dr. Goulden and Rollwagen could converse was absent, so that upon the showing of proponents, it was impossible for Bellesheim and Dr. Goulden to communicate their ideas to Rollwagen,

or for Rollwagen to communicate to them his desires and wishes.

Who wrote the signatures to the will and codicil ? Upon an inspection of each signature we see most striking resemblances to the handwriting of Lena. They do not bear any critical similarity to the handwriting of Mr. Rollwagen. The signature to the will is such an one as he could not for a long time before—certainly not for years before—have made. It is extraordinary. The signature to the codicil is a very different one, and it shows on its face that it was very much belabored. Whom does the testimony refer to as guiding the hand of Mr. Rollwagen ? From the commencement to the end of the case the testimony is somewhat full on the subject, and it all relates to one person. In respect to every instrument signed, or purporting to be signed, by Rollwagen, which is before your Honor, and in the signing of which his hand was guided, the evidence plainly shows that the hand which guided Rollwagen's was Lena's. The fact that she was accustomed to guide his hand in making signatures at or about this time—on one occasion on the 17th of April, on another occasion in the middle of May, on another occasion on the 14th of June, three days before this—the fact that on these three several occasions, just prior to the signing of the will, she guided Rollwagen's hand, writing his signature or his name to all the instruments, which during that period purported to contain his signature, is certainly proof sufficient to cast upon the other side the burthen of showing that she did not guide his hand upon this occasion.

The facts upon which I rely in discussing my third point are uncontradicted. That is to say, for the argument's sake in regard to this point, suppose that all the evidence of the contestants is stricken from the case, and that Mr. Rollwagen did and said everything imputed to him ; let it appear that Mr. Rollwagen said everything which even Theiss swears that he said ; strike out that portion of the cross-examination of Bellesheim and Goulden in which I

made them admit that Rollwagen said nothing; let it appear that Rollwagen, with his own tongue, said that which the subscribing witnesses on their direct examination attribute to him; let it appear further that he said in express words to these three witnesses, "This is my last will and testament. I ask you to witness it. I declare it to be such. I know the contents of that instrument." Let us suppose, furthermore, that Mr. Rollwagen could talk as well as any of us, and had repeated to the witnesses substantially the contents of those papers. What then? When we have emasculated the case in this way, and when we have emasculated it still further by striking out most of the evidence as to his physical condition, except as appears on the part of the proponents—then what have we?

Then within the doctrine expressly adjudicated in *Tyler agst. Gardner*, 35 N. Y. 581, your Honor would be compelled, as matter of law, to refuse to admit to probate either will or codicil. In that case Mrs. Gardner, as the Court said, unquestionably possessed testable capacity. The daughter gave instructions to Mr. Clark, the lawyer (a gentleman of eminence and unsullied integrity in the profession), as to how the will should be drawn. Mr. Clark, before drawing the will in pursuance of the daughter's instructions—if I recollect the case rightly—called on Mrs. Gardner and asked her if she desired the will to be drawn according to those instructions. At all events she assented to the instructions; and she told Mr. Clark to draw the will as her daughter, Mrs. Tyler, had directed. She assented to all the instructions. She did it deliberately—that is to say, she did it with a full knowledge of what she was doing. She was in a state of physical exhaustion; and although her mind, on account of infirmity of body, was easily wrought upon, yet, in the language of Judge Porter, in delivering the opinion of the Court, she possessed testable capacity beyond all question. Judge Porter, on that subject says (p. 580):

"Mrs. Gardner had undoubtedly testable capacity at the

“ time the will was executed, but was in a condition to be
 “ peculiarly exposed to exercise of undue influence.”

The point in that case was this: That where the chief beneficiary in a will engages the lawyer, gives the instructions for drawing it, superintends the matter generally, and the will operates to the prejudice of the heirs-at-law and next of kin, the law, on this state of facts, presumes undue influence or fraud, and adjudges a will made under such circumstances to be void. The burthen of proof is shifted, and it devolves upon the party propounding the will to be prepared to show, by affirmative proof, beyond the mere formalities of the execution of the will that it contains the testamentary intentions of the decedent.

In this connection I will invite your attention again, as I shall have frequent occasion to do in my argument upon this branch of the case, to the decision of the Court of Appeals, pronounced by Judge Porter, than whom an abler or more accomplished jurist never sat upon the bench. In reading his opinions we hardly know whether most to admire the soundness of his views, the cogency of his logic, or his felicity of diction.

The following extract from Judge Porter's opinion is peculiarly applicable to this case. At (pp. 584, 585) he says :

[George F. Langbein, Esq., who was associated with Mr. Clinton for the contestants, read the following extract from Judge Porter's opinion:]

“ In the leading case of *Blewitt v. Blewitt*, the issue was
 “ as to the execution of a will, made in feeble health, by a
 “ testator sixty-nine years of age, and under circumstances
 “ which exposed him to undue influence by a lady who had
 “ strong claims upon his justice as well as his bounty. That
 “ case, like this, presented unfavorable features peculiar to
 “ itself; but among those common to both were the weak-
 “ ness and exhaustion of the party, the entire departure
 “ from previous testamentary dispositions, the false impres-
 “ sions under which the will was made, the active agency of
 “ the beneficiary in procuring it to be drawn, her presence
 “ at the testamentary act, and the absence of those who

"had at least equal claims upon the justice of the testator.
 "The eminent jurist by whom the opinion was delivered,
 "after alluding to the force of the presumptions against the
 "instrument, from its hostility to previous testamentary
 "provisions, proceeds to say: 'It is difficult to conceive a
 "case in which that presumption would exist with more
 "force than in the present, looking to the former wills, to
 "the condition of the deceased, to the parties in whose
 "favor the codicil was to be made, being at the time about
 "the deceased, and to the absence of other parties, to whose
 "prejudice these alterations were to operate. In such a
 "case the fullest proof of capacity, equal, not merely to
 "some testamentary act, but to this important revocation
 "of former dispositions, and to a new direction given to a
 "large portion of his property, should be clearly estab-
 "lished; and, in this instance, the condition of the deceased,
 "the possession of him by the parties to be benefitted, and
 "the false impressions made upon his mind, have, also, a
 "strong appearance of fraudulent circumvention, requiring
 "the base to be proved by the most satisfactory evidence.'
 "(4 Haggard, 463.)"

Those authorities are cited with approbation, and applied
 by the Court of Appeals to the case of *Tyler v. Gardner*.
 Your Honor will observe the peculiar stress placed upon
 the absence of relatives and parties interested. In the
 present case they were not only absent, but they were not
 allowed to see the decedent at any time except in the pres-
 ence of Lena. The Court lays great stress, in the language
 quoted, upon the possession of the deceased by the persons
 interested; that is, upon their having full charge and con-
 trol over him. That applies very particularly to this case.
 Now, for the purpose of showing (which is the unquestioned
 law of the land), that the law presumes undue influence
 upon that state of facts, I will call your attention to another
 extract from the same opinion:

[Mr. Langbein read the following extract from Judge
 Porter's opinion]:

"Another significant and controlling feature of the case,
 "in view of the helpless and dying condition of Mrs. Gard-

“ner, is the fact that the written instructions for the Will
 “were prepared by the principal beneficiary. The rule of
 “law on this subject is well settled. It has been repeatedly
 “announced by this Court, and perhaps nowhere with more
 “precision and directness than by the present Chief Judge
 “in pronouncing judgment on the Will of Henry Parish.
 “‘The maxim *qui se scripsit hæredem*,’ said the learned
 “Judge, ‘has imposed by law an additional burden on
 “those claiming to establish a Will, under circumstances
 “which call for the application of that rule; and the Court,
 “in such a case, justly requires proof of a more clear and
 “satisfactory character. Such a condition is exhibited by
 “the testimony in the present case. The two codicils un-
 “der consideration were exclusively for the benefit of Mrs.
 “Parish, with the exception of the charitable gifts; and al-
 “though they were not actually written by her, yet they
 “were drawn up at her suggestion, upon her procurement,
 “and by counsel employed by her. She prepared and gave
 “the instructions for them; and, in judgment of law, they
 “must be regarded as written by herself—*Facit per alium*,
 “*facit per se*’”—(*Delaficed v. Parish*, 25 N. Y., 35). In this
 “case there is no proof or pretence that the instructions
 “were either written or dictated by the testatrix. It ap-
 “pears from the testimony of the draughtsman, that Mrs.
 “Gardner expected them to proceed from Mrs. Tyler, and
 “not from herself; and that she did not know on the day
 “the will was executed, whether such instructions were
 “written or oral, though it is proved that they were writ-
 “ten by the daughter two days before she transmitted them
 “to the draughtsman. The use in the instructions of the
 “mother’s name is not evidence that they were dictated by
 “her; and in the absence of such proof, upon the state of
 “facts here shown, the legal presumption is, that they were
 “not so dictated, and that they were prepared by the party
 “in whose handwriting they appear—(*Ingram vs. Wyatt*, 1
 “*Haggard*, 384, 439; *Croft v. Day*, 1 *Curtiss*, 853, 856;
 “*Baker v. Balt*, *id.*, 125). In the case first cited, it was ob-
 “jected that the rule was severe in its operation, as the
 “party who wrote the instructions could not testify; but
 “the Court said: ‘They are in the handwriting of Richard
 “Wyatt, the father, a quarter as unfavorable, perhaps more
 “so, as feeling a stronger interest than even Henry Wyatt
 “himself. It has been said that Richard Wyatt was inca-
 “pacitated by the state of his faculties from giving evi-

“ dence ; that he could not be examined ; that he might
 “ have proved receiving these instructions from the de-
 “ ceased himself. That is mere conjecture, which cannot
 “ compensate for proof. If the evidence is by accident de-
 “ fective, the misfortune, especially in such a case as the
 “ present, must fall upon the party upon whom the burden
 “ of proof lies ’—(1 *Haggard*, 439).

“ In the present case even this consideration cannot be
 “ urged. *Mrs. Tyler was at liberty to testify, but chose not*
 “ *to be examined, and to leave the matter as it stood.*”

In *Tyler v. Gardner* it appears that Mrs. Gardner understood perfectly the contents of the will ; and although the instructions for it had been written by Mrs. Tyler, yet Mrs. Gardner accepted them. The Court held that even that did not rebut the presumption of fraud and undue influence.

Judge Porter continued, (p. 590) :

“ Keeping in view, as we must, the dying condition of
 “ Mrs. Gardner at the time the transaction in question oc-
 “ curred, the force of the fact that the beneficiary wrote the
 “ instructions and originated the will, is not necessarily
 “ overcome by the circumstance that they were afterward
 “ accepted by the testatrix, and that she assented to the will
 “ in which they were embodied. The observations in one
 “ of the opinions delivered in the Parish case, are especially
 “ pertinent to this point : ‘ The whole evidence of the
 “ case,’ said the learned Judge, ‘ places him in a position
 “ where an enfeebled intellect, though far from losing its
 “ intelligence and its capacity to do ordinary business, may
 “ well be presumed unequal to resisting reiterated impor-
 “ tunities from one in her relative position. It would seem
 “ plain that she could have exercised an influence in regard
 “ to this codicil which would not leave him to the exercise
 “ of his own free will. Are there any circumstances in this
 “ case to show that she did so ? Or does it appear that,
 “ having the power, she gained a victory over her naturally
 “ excited feelings, and magnanimously forbore to use it ?
 “ The whole burden of this codicil is for her benefit. Sup-
 “ posing it was made under her control, *se scripsit hæredem* ;
 “ nor, upon this supposition would Mr. Lord’s presence, and
 “ the fact that Mr. Parish assented intelligently, and delib-
 “ erately, and in detail, to the provisions of the instru-
 “ ment, relieve her from that position, for the influence was

“ easily exercised when once its subject had been brought
 “ to submit to it, and in a way not at all suspicious—a way
 “ not likely to be observed by any one who had no idea of
 “ its existence.’ (25 N. Y. 92).”

It is true that in *Tyler v. Gardner* the will was executed upon a deathbed. A will thus executed, however, is just as good as though executed at any other time; and the greater number of wills, probably, are executed just before death. All the reasoning of the Court in *Tyler v. Gardner* applies to the case at bar, because the facts here are much stronger for the contestants than they were in that case. There, the one who appealed to the benevolence and kindly disposition of the decedent was her own daughter. She had her claims upon her. It was proper that the daughter should exercise a certain amount of influence over the mother. The mother was some sixty years of age when the will was executed. The daughter was probably twenty-five or thirty years younger. The most happy relations between the mother and daughter had existed. The daughter and mother were in each other's society constantly. By degrees her son was excluded from her society, and substantially, through the influence of Mrs. Tyler, expelled from the household of Mrs. Gardner. Therefore, the Court bases its reasoning upon the fact that she was peculiarly susceptible to the influence of Mrs. Tyler. In the case at bar, according to all the testimony, even of the other side, no child was ever more dependant upon its mother or nurse than was Mr. Rollwagen upon Lena. He was entirely dependant upon her. She refused to permit his relatives to come near him—she claiming and exercising absolute control over his person. The reasoning in that case applies therefore much more forceably to this.

Again, Lena, if married at all, had married Rollwagen but two years before his death. Before the marriage she was a mere servant. She had no claims upon him beyond what the law gave; and if he possessed any mental capacity the influence she acquired over him was an undue influence.

In the case of *Tyler v. Gardner*, the daughter had a right to a certain amount of influence; and it would be but natural that a mother should provide liberally for the daughter; but even there, where the will went so far as to do injustice to the other children, and the daughter was instrumental in procuring the will to be drawn, the law on that state of facts, adjudged the will to be void, and presumed it to be fraudulent. It is true that the law does not, in and of itself, presume undue influence. It does not presume fraud. But when a state of facts exist from which the law holds that undue influence is established, then the burthen of proof is shifted to the other side. It is incumbent on proponents to prove that the paper was executed without regard to any such restraint or influence. *No such evidence exists in this case.* For the correctness of this proposition of law, I cite from Judge *Porter*, in the same case (p. 594):

“ It is not to be supposed that fraud and undue influence
 “ are ordinarily susceptible of direct proof. Subscribing
 “ witnesses are called to attest the execution of wills, but
 “ not the antecedent agencies by which they are procured.
 “ The purposes to be served are such as court privacy rather
 “ than publicity. ‘ In some cases,’ as this court said in the
 “ case of *Sears v. Shafer*, ‘ undue influence will be inferred
 “ from the nature of the transaction alone ; in others from
 “ the nature of the transaction, and the exercise of occa-
 “ sional or habitual influence.’ (2 *Seld.* 272.) The grounds for
 “ imputing it, as Sir *John Nicholl* said, in the case of *Marsh*
 “ v. *Tyrrell*, ‘ must be looked for in the conduct of the par-
 “ ties, and in the documents rather than in the oral evidence.
 “ The necessary inferences to be drawn from that conduct
 “ will afford a solid and safe basis for the judgment of the
 “ court where the oral evidence harmonizes with those infer-
 “ ences, a moral conviction rightfully follows ; but the depo-
 “ sitions where they are at variance with the conduct of the
 “ parties, and with the *res gestae*, are less to be relied upon.’
 “ (2 *Haggard*, 84.) It was held in this State by the Court
 “ of Errors, that a circumstance indicative of undue influ-
 “ ence, was the fact, common to that case and to this, that
 “ the donor was brought, before the execution of the instru-
 “ ment, to a state of causeless alarm as to the condition of
 “ his property, and of groundless suspicion against mem-

“bers of his own family. (3 Cow., 537, 572.) So in the
 “Parish Will Case, it was said, in the course of the com-
 “ments upon the circumstances, raising a presumption of
 “undue influence by the principal beneficiary: ‘Direct evi-
 “dence of her control in these matters, of her actual exer-
 “cise of undue influence in procuring her will to be exe-
 “cuted by him could hardly be expected. The means of
 “keeping the influence out of sight were too many, and
 “too easy of application. But when such is the array of
 “circumstances, when such a result is attained without any
 “more substantial apparent cause, we are justified in say-
 “ing, from the evidence, that the only cause to be inferred,
 “which is in the least degree adequate to produce the result,
 “is a long continued, persistent, overpowering influence, to
 “which his condition rendered him peculiarly subject, and
 “which she was as peculiarly in a position to exercise.’
 “(25 N. Y., 95.)”

In the declaration put into the mouth of Mr. Rollwagen, that he was a poor man, I wish it to be understood that I deny that he made any such statement. I do not think that he did, but if he did, the statement may have been intended to convey the idea that it related to his health. I give the other side the full benefit of that, and I see nothing important in the declaration. Mr. Rollwagen was not in a condition in which he could have said that. I suppose that that was an idea, too, of Lena and not of Mr. Rollwagen, and the very phraseology belongs to Lena, for he thought and spoke, if he thought and spoke at all, through Lena. I will now call your Honor’s attention to another feature in our case:

“Where a testator is unable to read or write, is extremely
 “ignorant, weak in understanding, subject to passions and
 “prejudices, and susceptible to undue influence, the will
 “*cannot be admitted to probate on the simple proof of formal*
 “*compliance with the requirements of the statute.* The pro-
 “ponents must in such case show that the testator under-
 “stood what he did and intended to dispose of his estate,
 “according to the legal effect of the will” (2 Bradford, 69,
 133; 30 Barbour, 134).

In this connection I will invite your Honor's attention to the proof which is undisputed, that Mr. Rollwagen could neither read nor write. It was even very difficult for him, in his best days, to understand a paper when it was carefully read and explained to him. Mr. Geissenheimer, his counsel from 1846 till 1873, states with reference to the legal papers he drew for the decedent; he usually not only explained them to him fully, but read them over to him two or three times (fol. 1072). Mr. Geissenheimer, upon the subject of decedent not being able to write, testifies as follows:

"Q. In no instance, where you have prepared a legal document for him (Rollwagen) to sign, did he ever attempt to read it ?

"A. No, sir; he could not read writing.

"Q. Therefore state whether you were not particular to read them to him or state their contents ?

"A. I almost always read a paper twice, and sometimes three times to him.

"Q. On account of knowing that he could not read ?

"A. Yes, sir; and on account of his particularity too; I will add, he was very particular as to what he signed.

"Q. Therefore you frequently read them over two or three times ?

"A. Yes, sir." (Fols. 1071-2.)

The witness never knew of Rollwagen reading anything in print. He said he brought him hand-bills of auction sales. The witness testified:

"I have seen him (Rollwagen) have hand-bills of auction sales, and he seemed to know what was in them, but whether he read them or not I cannot say."

"Q. You never heard him read anything ?

"A. I never heard him read." (Fol. 1070.)

Anthony Dugro, who had known decedent intimately for thirty years or more, testified that he could not read or write. The following is an extract from his evidence:

"Q. Do you know whether he (Rollwagen) could read or write?

"A. He could not read or write.

"Q. Did he tell you so?

"A. He told me so." (Fol. 1535.)

Barbara Sheppard, Mr. Rollwagen's niece, testified that he could not read or write. She testified as follows :

"Q. State whether Mr. Rollwagen could read or write?

"A. As far as I know he could not; I never saw him read and I never saw him write.

"Q. Did you ever have any conversation on the subject of his not being able to write, and if so, state it?

"A. On one particular occasion—yes; on several occasions we would like to have had a confidential correspondence.

"Q. You?

"A. And my uncle Frederick.

"Q. State the conversation between you and him on that subject?

"A. He told me that he would like to mention subjects to me very often, but he could not write, and he would have to take a third person to write his letters.

"Q. When was that?

"A. It was before this, in 1869.

"Q. Go on?

"He wanted to write me on subjects, and he did not wish third persons to know, and he would have to tell some one to write it; and when I made a reply to him, he would also have to have another person to read it to him.

"Q. Did he say he would have to have another person to write his letters for him?

"A. Yes, sir.

"Q. What did he say about the third person?

"A. Anything confidential he wished to inform me of, he did not wish to have other persons know of—he did not wish any other person to know of but himself.

"Q. Did he say anything about any body outside of his own relations?

"A. No, sir; when the children were not around—when the children were not there to read to him.

"Q. And that he would have to have somebody other than his children?

"A. Yes, sir, his children.

"Q. And that he did not want to do on a subject he wished to communicate confidentially to you on?

"A. Yes, sir." (Fols. 2725 to 2728.)

It also appears from the testimony of Jacob Moore, that the decedent could not write. (Fols. 2214 to 2216.)

Henry Hermann testified that the decedent could neither read nor write.

Although there is evidence showing that the decedent, when a child went to school, yet the proof is uniform that from the time he arrived in this country in the year 1829, to the period of his death, he was not able to read either print or writing, and he was unable to write anything except his name.

There is not a particle of evidence in the case from beginning to end which tends to rebut the idea of undue influence and fraud which the law says is proven on the state of facts which is undisputed and uncontradicted. The only evidence in the case from beginning to end in respect to Rollwagen's declarations with regard to the will, is Mrs. Perry, testifies that Rollwagen told her that he was going to alter his will, and give Lena the new house in place of the old one. That is the only testimony upon the subject in respect to any declarations of Mr. Rollwagen, with regard to the will. If he made such a declaration, it does not add to or diminish the force of the other facts in the case.

In respect to the codicil, the only evidence as to any declaration, is given by a witness incredible; but, assume for this purpose that his statement is true, that the codicil was made on account of Lena being pregnant, and that the decedent made the codicil for no other reason. That would not alter the fact at all. That is simply saying that he had made a codicil. Therefore I say that there are no facts, and there is no evidence in the case even tending to rebut the fraud and undue influence which the law says are overwhelmingly proved by the undisputed facts in this case. Therefore, in no conceivable aspect, have the proponents

any standing in court. On the testimony of the subscribing witnesses alone, had there been no other witnesses called in this case, it would have been your Honor's bounden duty to refuse probate to either the will or codicil, and upon a refusal so to rule, the Appellate Court would, almost without argument, set aside the decision.

The case of *Delafield agst. Parish*, 25 N. Y., p. 9., was far more favorable to the proponents than the case at bar. The codicils were drawn by Daniel Lord, then at the head of the bar of this city. He took, as he supposed, the greatest pains in ascertaining the wishes of Mr. Parish. His communications with him were direct. He drew the codicils in pursuance, as he believed, of the instructions of Mr. Parish himself. He left out some provisions which he had intended to put in, because, as he supposed, he was so instructed by Mr. Parish. The mode of communication on the part of the decedent was by negative and affirmative answers. Upon this branch of the case, Judge Selden, in his dissenting opinion, says, (pages 105-6):

" Among the witnesses called by Mrs. Parish to support
 " the codicils are her brothers, Edward, Henry and Richard
 " Delafield, Mr. Lord, who drew the codicils; Mr. Taylor, a
 " minister, and rector of Grace Church; Mr. Tileston, Pres-
 " ident of the Phoenix Bank, and Gov. Bradish, President
 " of the Bible Society. All these are conceded by the
 " counsel to be men of the highest character and intelli-
 " gence. Of the three brothers of Mrs. Parish, Edward was
 " the physician of Mr. Parish, and in constant attendance
 " upon him during the whole six years of his illness; Henry,
 " a merchant, lived in the house with him during this time,
 " and was with him a great part of nearly every day; Rich-
 " ard, a Major in the United States Army, and Superinten-
 " dent of the Military Academy at West Point, had frequent
 " opportunities of intercourse with him during the same
 " period. Mr. Taylor was also a frequent visitor of Mr.
 " Parish, administered the sacrament to him upon many
 " occasions, and had other religious intercourse and various
 " financial transactions with him; Mr. Lord drew the
 " codicils, was many times in consultation with the testator

“in regard to them, and witnessed their execution; Mr. Tileston was President of the bank in which Mr. Parish was a large stockholder, saw the latter frequently, and negotiated with him upon some matters of business of great importance; Gov. Bradish was a friend of Mr. Parish, visited him several times during his sickness, and received from him personally a large subscription to the funds of the Bible Society. All these witnesses, without exception, express the most decided conviction that the testator had intelligence, and that he perfectly understood the various matters to which their intercourse with him related. Mr. Lord, in answer to a question as to the state of the testator's mind upon the execution of the second codicil, said: ‘I had no doubt, and have not any, of his entire capacity to understand what he was doing and the effect of it.’ In reply to a similar inquiry as to the mental capacity of the testator upon executing the third codicil, he said: ‘In my judgment it was perfect for the purpose of making a codicil of this kind; he fully understood it, and fully agreed to it.’”

On behalf of contestants there was evidence presenting an entirely different state of facts. The preponderance of evidence, however, was nothing like as strong in the contestants' favor as in the case at bar. In the Parish will case, among other things, it appeared that the decedent and Mrs. Parish frequently called at the office of Mr. Ward, a prominent broker in Wall street, who transacted business for Mr. Parish. Mr. Ward made investments for him. When he proposed to make investments on certain securities, Mr. Parish and his wife would take time to consider. Mr. Ward testified that this was not true in respect to promissory notes; that when they were proposed, Mr. Parish being familiar with the standing of the firms who were the makers of the notes, decided in relation to them at once. This was cited as proof of the existence of the mental capacity of Mr. Parish. The facts tending to show mental capacity were infinitely stronger in the Parish will case than in the Rollwagen case. Both were afflicted with the same kind of paralysis, viz., hemiplegia. There is one marked difference between the two cases. After Mr. Par-

ish's attack of partial paralysis his general health continued good, and he exhibited a great amount of muscular power. After Rollwagen's attack his bodily health was very bad; he was feeble, and his strength wasted away until death finally overtook him.

In the Parish will case, as well as in the Rollwagen case, it appears that the business of each was conducted in his own name, and the parties who had business transactions communicated with them and addressed them personally, the same as though they were capable of transacting business. This was done to a much larger extent in the case of Parish than in the case of Rollwagen. The business of Rollwagen, which consisted in collecting rents, taking care of his real estate, and, in 1873, erecting an additional building, was carried on by Lena and Henry Hermann.

Early in 1871, as already shown, Mr. Rollwagen said that he would build no more, for the reason that he was too old, and he was unable to attend to such business. Yet it appears that Lena and Henry Hermann, who did all his business in his name, contracted for the erection of a new building in 1873, and supervised all the business connected with its erection.

In one particular the Parish case differed from that of Rollwagen. Parish before his attack was a man of good education, and fine mental culture. Therefore when books and papers were shown him, it could not be proved that he did not read and understand them. In this way he might have acquired information as to his business and other matters. Whether in fact he read or understood any papers, could not be known, because he was deprived of the power of speech. Rollwagen had not this advantage. As already shown, he never could read; at all events the testimony shows that during the entire period he was in this country, namely, from 1829 to 1873, he could not read either print or writing. In this particular the case of the contestants is much stronger than the Parish will case.

In the discussion of my third point, I have established the following propositions :

1st.—Henry Hermann went for the lawyer (Bellesheim), who drew the Will and Codicil.

2nd.—Lena paid him for his services in drawing and superintending the execution of the Will and Codicil.

3rd.—Lena gave the instructions in regard to both Will and Codicil, as to what provisions should be incorporated in each instrument.

4th.—Mr. Rollwagen, although present when the instructions were given in relation to the Will and Codicil, took no part in the matter, and did nothing except to make meaningless motions and utter unintelligible noises from his throat.

5th.—Lena engaged the subscribing witnesses to attend on the execution of both Will and Codicil, one being her physician who charged for each attendance, as a professional visit—another being an undertaker whose relations to the case are peculiar and extraordinary.

6th.—At the time of the execution of both Will and Codicil, Rollwagen did not speak a word, and took no part in the execution of the instruments, except that his name was signed to them, either by himself or some one else, who probably wrote with his hand.

7th.—Lena is the only beneficiary, the only person who is in any way directly benefitted by the Will and Codicil. She gets the bulk of the estate of the decedent, and substantially disinherits the heirs-at-law and next of kin.

8th.—These facts are established beyond question, by the evidence of the subscribing witnesses. There is no testimony whatever which rebuts ; there are no facts in the case which even tend to rebut,—the legal presumptions of undue influence, fraud and circumvention, arising upon these facts.

9th.—Upon the doctrine of the cases of Delafield *agst.* Parish, and Tyler *agst.* Gardner, as laid down by the Court of Appeals, upon the undisputed facts—upon the evidence of proponents—upon the testimony of the subscribing witnesses alone, it is the imperative duty of the Surrogate to refuse to admit to probate either Will or Codicil. I will now proceed to the discussion of my

FOURTH POINT.—The making of the Will and Codicil, and the execution of them (aside from the question whether deceased possessed testable capacity) were brought about by undue influence, fraud, and circumvention; and on this ground it would be the imperative duty of the Surrogate to refuse to admit either instrument to probate.

So far from the proponents having rebutted the legal presumptions which arise upon the face of the Will and Codicil, and upon the evidence of the subscribing witnesses, the fraud and undue influence are affirmatively established by the undisputed facts of the case.

Under my third point, I showed that upon the undisputed facts appearing in evidence, the law adjudged that an overwhelming case of undue influence, fraud, and circumvention had been proven. Whether the decedent possessed sufficient mental capacity to become a prey to such influences,—whether he had enough mind for these influences to take hold of,—or whether his mind, like his paralyzed right hand, had lost all grasping power, is another and totally different question.

That Lena, from the time she entered the employment of decedent, in 1869, strove to the utmost to exercise upon him undue influence, and to practice fraud upon him, is beyond question. At what particular time he ceased to pos-

ness sufficient mental capacity to become the victim of undue influence and fraud, it is impossible to tell, for the reason, that having lost the power of speech, he had no way of communicating his thoughts. If he possessed any mind, it was *imprisoned*, and could no more manifest itself than his body could exhibit vitality—signs of life—after it had been consigned to the grave.

In the discussion of my fourth and last point, I call your Honor's attention to many facts, all—or nearly all—of which are undisputed, showing, on the part of proponents, one of the strongest cases of undue influence and fraud ever brought before this Court. Proponents cannot escape the force of the facts which I will collate and bring to your attention, under this point, unless decedent was entirely destitute of mental capacity. Situated as he was, his mind imprisoned, his body imprisoned, with Lena for his jailer, nothing but utter imbecility—practical idiocy—could shield him from the undue influence and fraud constantly practised by Lena and Henry Hermann.

I do not intend to discuss the legal effect of the marriage ceremony between Lena and the decedent, performed by the Rev. Dr. Busche. The other side are welcome to all the benefit they can derive from this evidence. At the time of this alleged marriage, deplorable, indeed, was Mr. Rollwagen's condition. He was but a wreck, the veriest shadow of his former self. He had lost almost wholly the power of locomotion; the power of speech was gone; he was weak and helpless, unable to feed himself; dependent upon others to an extent that was pitiable. He was almost as helpless as a child; his intellect nearly, if not wholly, gone; without intellectual resources, had his mind been spared him; without culture, destitute of education, without memory sufficient to recollect the past, the future a dreary waste—an utter blank. Lena Hermann, his servant and housekeeper for two years, who, like the house he lived in and the furniture he used, had become associated with his ailments and his infirmities, determined to profit by his

calamities and grow rich upon his misfortunes. She endeavored to make him believe that his physical existence depended upon her. Mrs. Koch testified that Lena told her that he continually refused to marry her, and said he was ashamed to do so. Lena admitted that she threatened and continued to threaten to leave him if he did not marry her. According to the declarations of Lena, his choice lay between marriage with her and death, and long did he hesitate. So long as he had any strength of mind or body left he held out, and was firm as the rock of Gibraltar; he could look on death with cheerfulness. The language of his heart was

"O! amiable, lovely death!
Thou odoriferous stench! sound rottenness!
Arise from the couch of lasting night,
Thou hate and terror to prosperity,
And I will kiss thy detestable bones,
And ring these fingers with thy household worms!"

sooner than marry this well-paid servant, this bad woman, full of low cunning and mercenary designs. Upon the other side they would have us believe that at a time when strength of mind and body was gone, the power of resistance failed, and, as a choice between death and Lena, he yielded to the latter.

This is the case presented by the other side. Lena Hermann pursued Frederick Rollwagen for two and a half years before the date of the catastrophe of the marriage with her. Her designs upon him were manifested early in 1869. Upon this subject the testimony is undisputed.

Bear in mind that in the Spring of 1869, Frederick Rollwagen took this woman into his employ. She was the blood niece of his first wife. When she first came to this country she was employed by Mrs. Rollwagen as her servant, and in this capacity continued long in her family. Lena and her family were among decedent's poor relatives. After Mr. Rollwagen's first wife had died, after he had married a second wife, and in the course of a twelve month she had

died also; he went to live with one of his sons. Subsequently, as he told Barbara Koch, he thought it would be better for him to engage a servant or housekeeper, and keep house. He said that he would not marry again; that he was too old and sickly—too feeble. This testimony is undisputed. Having then a young son, George, who was about seventeen years of age, he commenced housekeeping. His health having failed, in view of the relationship which existed—not a blood relationship on his side—but this woman was a blood cousin of his children, having befriended her in her poverty, he naturally selected her and designated her as his housekeeper. She had occupied the same position in other families.

What next in the order of events? The ensuing summer he went as usual to visit his sister and niece, Mrs. Sheppard, at Verona, and while there, in the freedom of the confidential relations existing between those so nearly allied by blood, he stated to Barbara Sheppard that he would not marry again. He said to her "There is an old woman who has a daughter named Lena; the family want a home; I am pressed to marry her, but I will never *buy a wife*." Mark the expression. The old man saw the designs at that time even, and he stated the determination of his heart when he said that "he would never *buy a wife*." This fact proves that not alone Lena Hermann is scheming and plotting, her maternal ancestor is brought into active service. *She* is on the trail of Rollwagen; she is probably the originator of the plot. They want a home. Where and how did they live before? The testimony is undisputed. They had lived in these cheap groceries. In one place they all lived on one floor—a little grocery in front at which they doled out to customers in small quantities—not enough, as one witness says, to pay expenses. They had lived in Houston street and in other streets, as the testimony shows, in a state of poverty. Henry Hermann has testified that, during a period of eight or ten years, he amassed two thousand dollars. I have no doubt he was very industrious in saving it; and he

tells you that he supposed his receipts after he got in with Rollwagen, and lived in one of Rollwagen's houses, amounted to forty dollars per day. Our testimony shows a much less sum. He states that that business yielded him a profit of from three to four per cent. Taking it at four per cent., and we find that in his palmiest days, when he was in the height of prosperity, his business yielded a profit, if his figures are correct, of not over one dollar and sixty cents per day. Out of that he said he had to support a family of three. You can judge what were his gains; and from the testimony in this case you can judge as to the means of the other members of the family. In the emphatic language of Mr. Rollwagen, "*they wanted a home.*" They saw that this man, Frederick Rollwagen, had amassed a large fortune, although I presume he began poor: this mother saw that he had accumulated wealth by the hundreds of thousands. She set her longing eyes upon his estate, and her daughter was to be the instrument by which that estate was to be plundered; and now that daughter's daughter is sought to be made the instrument by which the estate is to be still further plundered.

What next? Barbara Sheppard states that she did not know to whom the term or name "Lena" was applied. Lena was cunning to the last degree. The fact that she has low cunning is proven by the countenance of her brother. We have seen him as a witness in this case; your Honor saw that his face had low cunning written all over it in very legible characters. Low cunning never appeared more conspicuously than in reference to that individual. You have seen it exhibited throughout this case every day and at every step in our proceedings. When we wanted to get certain papers we could not procure them. When we wanted to obtain one of these papers to which Rollwagen's name had been signed, it was found necessary that an order should be made by the Court requiring it to be produced. We applied over and over again for the paper, and

it was when resistance was found to be useless that we finally succeeded in getting it. Your Honor and myself have had ample opportunities to judge of character. Our professional course has been such that we have been—as every lawyer has been—frequently in positions where we have been afforded the most ample opportunities to read human nature. There is no school better than that of a lawyer. His whole study is of human nature. He reads it in the countenance of the witness before him. He reads it in the acts of his client. He sees it everywhere. This is his study; it is his specialty. I would not require anything more before a jury than to compel the attendance of Henry Hermann, and have it an admitted fact that Lena was his sister, and her and his low cunning would be judicially established for all practical purposes.

What next in this scheme? Lena goes to the house, 334 Ninth street. Whom does she find there? The decedent, George, his youngest son, his second son, Louis, and his wife. Within less than two months, according to the evidence, Louis and his wife leave. One point is gained by Lena in her effort to get possession of decedent. She has in part gained possession of his person, and that is what Lena is determined to get. What next? The next thing we hear is, that in some way or other George Rollwagen leaves and goes to California. It would appear by some of the letters in this case that there were certain reasons or certain motives that induced him to leave New York.

Lena prompts his departure. After he goes, what does she do? Read her letters, which tell him to “*stay, stay, stay.*”

In one of her letters, written to Barbara Sheppard about this time (Nov. 8th, 1872), she says:

“George has gone to California. His father did not want him to go.”

She says he went on account of some domestic matter, to which it is not necessary to advert. In this same letter,

written a month or so after George had left for California, Lena asked Barbara Sheppard to write, and says :

“And you may send the letter to Uncle, as always. “Why? *Because George is not here.* Don’t write especially “to me. Frederick sometimes wants to read the letters.” (Fol. 5291.)

This letter shows that Lena thought she had established *confidential relations* with Barbara Sheppard; and this will account for much of the freedom of conversation which afterwards obtained between them. Lena endeavored to secure the friendship of Barbara Sheppard. She thought that she had made a friend of her. Perhaps she had; perhaps not. At all events that is immaterial in this branch of the case.

What next? After having so arranged, that Louis and his wife leave, and George leaves—what then? Then Lena is in *sole* possession of this decrepid old man, this speechless imbecile, this helpless, forlorn child. All this is a part of the plot. After she get possession of him, then she begins to scheme in earnest. She began before, but she could not consummate her scheme. In the Summer of 1872 she visits Verona, as I have shown in a previous part of my argument. While there, Rollwagen was in the helpless condition described in the evidence referred to yesterday. Lena had frequent conversations with Mrs. Sheppard. In that freedom which obtains between ladies, or between those visiting under such circumstances, and between whom such relations exist, she told her the state of Rollwagen’s feelings with reference to herself. And what were they? Were they such as obtain between man and wife? Were the relations between Rollwagen and herself such as ordinarily exist between married persons? Did confidential relations exist? Did confidence to any extent between the two exist? *No!* Lena states a fact which furnishes a key to unlock considerable of the mystery of this case. She states to Barbara Sheppard that Mr. Rollwagen had no confidence in her—in respect to what? Money matters? *No.* He

had *no confidence in her virtue!* She says: "He won't trust me!" And then she stated the particulars of an occurrence showing that Rollwagen did not believe in her virtue.

Lena said that on the occasion in question she went out professedly on some matters of business, and Rollwagen, believing that she had gone for improper purposes, rushed after her in his shirt sleeves, and went around the block in pursuit of her. His enfeebled condition must have prevented his going very fast, but he went as rapidly as he could; the door blew to while he was gone, and in that way he got locked out, so that when he returned to his own house he had to go to the neighbors and enter through a side window in order to get in his own house. Lena mentioned this circumstance herself. It meant one thing, and no more; it meant a lack of confidence in her virtue. I asked the witness, Mrs. Sheppard, what the subject of conversation was. She said it was jealousy. I asked her if it was evidence of improper intercourse between the sexes. She said that was the subject under discussion. Mrs. Sheppard said that while she and Lena were talking upon this subject, Lena stated that Rollwagen was jealous of her because she was virtuous, and he did not believe in her virtue. Was this not jealousy? When was it that Rollwagen rushed around the corner in his shirt sleeves? The witness is silent as to the date. It occurred long before Lena was married, and certainly before her marriage with George Hamner; and if her statement occurred probably at a time when Mr. Hamner was unable to reflect to know what he was doing. It was in the summer of 1872 that Lena told the witness that on one of that summer the fact occurred. We must presume, for the purposes of this case, that it was before the marriage ceremony was performed. It occurred after that time, according to the evidence, Rollwagen was unable to speak, and unable to

What does this evidence show? A scheming mother! A daughter whom Mr. Rollwagen did not believe to be virtuous. Why should he go after her in his shirt sleeves? She was his niece by marriage, and if she were an improper character he did not want her in his house. Therefore he had a motive in following her. The jealousy of Mr. Rollwagen—whether she was there in the capacity of servant, housekeeper, or niece of his former wife, in whom he had more than an ordinary interest—is a matter to which such weight will be given as it deserves. But this fact is demonstrated beyond all peradventure—that *Mr. Rollwagen believed that Lena was destitute of virtue.*

In this connection I will refer to another incident. When Barbara Sheppard and her mother were here in February, on one occasion Lena went out. The old man could not speak. Whether he had any intellect at that time, we cannot know. But Barbara Sheppard states that when he saw Lena go out, he motioned to her—as she supposed—to follow. He had a certain look which was restless and uneasy. She construed that circumstance as an indication that the old man wished her to follow Lena. To humor or quiet him, she did pretend to follow her. What did that mean? Did it mean that the old man, long after he had lost the power of speech, still having some faint glimmerings of intellect left—enough at least to appreciate that particular subject, if none other—did it mean that Lena Hermann, knowing that he was speechless, misconducted herself before his very eyes? Connect that fact with the circumstance to which I will allude, that, although this man was as impotent, paralytic, and powerless for the purposes in question as any inanimate object, yet within a few days from the time Mrs. Sheppard says that he by his signs indicated to her that he wanted Lena followed;—within one week or less from that time, calculating according to the ordinary period of gestation, Lena Hermann became pregnant! Connect these events together. You have the fact that Rollwagen was *speechless and powerless.* Did she think

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Did Lena exercise undue influence, assuming that the old man had mind upon which influence could be brought to bear? If he married her, from what motive had he consented—if he did consent—to the marriage? If she remained under the circumstances stated, what motive prompted him? Was it her services? She performed all those services for him for over two years, at the rate of fourteen dollars per month. She went there solely to perform those services.

If there were a marriage, how came it? Lena has not gone upon the stand to testify in regard to this, but she has spoken through the lips of others. She claimed that Rollwagen talked through *her* mouth; now we will let her speak through the mouths of some of the witnesses who testify here.

Martha Miller, her own witness, states that Lena told her that the old man married her because he wanted somebody to take care of him. This Martha Miller is the same witness who testified to facts which we proved were incredible. Lena tells this witness that Rollwagen said certain things. Lena put into the mouth of Rollwagen certain declarations. He was speechless, and could not have thus spoken. But if he did, what does the fact show? It shows *undue influence*. We have proved beyond all peradventure the undue influence, fraud, and circumvention practised by Lena.

Lena stated to Barbara Koch that she told Mr. Rollwagen that if he did not marry her she would leave. At this time he was perfectly helpless; in 1869 his health was failing very rapidly; in 1870 it became worse; in 1871 he was a wreck. Your Honor remembers our testimony in regard to the Spring and Summer of 1871. Our witnesses show that Rollwagen could not speak. The testimony

shows that he was unable even to control the calls of nature. What reason does she give for asking him to marry her? Evil be to her who evil thinks. She says she told Mr. Rollwagen that if he did not marry her, her character for virtue would be impugned; and people would say that she was a wife *de facto* if not *de jure*. A most remarkable statement! This is what Lena Hermann tells Barbara Koch, during the lifetime of Mr. Rollwagen, and after she claims to have been married. That is significant, because it shows the current of thought of Lena Hermann. She did not state that fact until Mr. Rollwagen was past the power of speech, and could not deny it. But look at the statement. She says that her virtue will be imperiled if Mr. Rollwagen does not marry her! She had lived in his family twenty years before. She had lived with him in Ninth street, when his son George was with him. She had remained there upwards of two years and a half. If her virtue could survive living with Mr. Rollwagen in 1869 and 1870—when his health was so much better than at any subsequent period—what imminent danger could there be after he became so utterly paralyzed and helpless?

It is a false reason. It is the reason of a schemer. It is the reason of a plotter. It is language put into the mouth of a dumb man, because he is powerless to contradict it. The reason for her conduct, on its face, was a false one; and if her reason for the marriage were a false one, we have the right to argue that the whole plan was one of fraud and circumvention. Why did she give that reason? Because she knew that the position of wife to Rollwagen was a fraud on its face. This maiden (she says forty-one in her marriage certificate, but I think she is about half a century old) had lived to that period of life single. Why then does she give out that her virtue is in danger if she lives longer in the family of the husband of her blood aunt without a marriage ceremony? It was an unnatural marriage. It was a marriage that Mr. Rollwagen would not have entered into had he been in his right mind—clearly

not, unless upon compulsion. Lena herself says that *he refused to marry her*. She requested it time after time, and as often did he refuse. She stated that he said he *was ashamed to marry her*. If he did say that, then we must admit that in reference to that observation, at all events, he was sound and rational. "*He was ashamed to do it.*" If he had any mind left, at the time the ceremony was performed, well might he be ashamed. The idea that this niece should seek to establish conjugal relations with the husband of her blood aunt, by whom, to a certain extent, she had been brought up, is something repulsive. Although not so in point of law, yet in morals it was an incestuous marriage if it occurred under the circumstances to which I have adverted. It was a marriage that was unfit and unseemly. Lena Hermann knew perfectly well that so long as the decedent was Frederick Rollwagen, that so long as he was capable of managing his own affairs, he would sooner die than take his wife's niece to the matrimonial couch. I have never known a case in which more shameless scheming and plotting has been brought to light.

In some way or other Lena got Mr. Rollwagen to the Rev. Dr. Busche's. They have alluded to the fact that he performed the marriage ceremony between Mr. Rollwagen and his second wife. I put some questions on that subject which might have pointed to certain facts, but they were not developed, and we prefer to draw the curtain over that subject. It is not before the Court. The fact however came out on the examination of Dr. Busche that he went to the house and married the second wife; that he made one call afterwards, and that was the extent of his acquaintance.

A marriage ceremony between Lena and decedent was undoubtedly performed. Mr. Busche, judging from his habits, thinks that Mr. Rollwagen must have responded. Whether he did, is not the subject of inquiry here. For the purposes of this case, we take the marriage certificate for what it is worth. The question of the marriage, and the

question of legitimacy, are not before the Court for specific adjudication in this case ; although the question of legitimacy has a strong incidental relevancy with reference to the undue influence, fraud and circumvention practised upon the decedent, and to that extent is a subject proper to be brought to your attention and commented upon. At all events, the marriage ceremony was performed. Two and a half years before this event, Lena had managed to get Louis Rollwagen and his wife out of the house. The next thing is to get George away ; that is accomplished within about a year of the marriage ceremony. Lena Hermann is installed in full possession of the residence of Mr. Rollwagen. She becomes his agent for the purpose of business. She is the interpreter between him and the outside world. The people who come to the house to see him, can only talk through Lena Hermann. The old man, at the time of the marriage, according to Lena Hermann's own admission, was a paralytic. She stated to Dr. Tully that he was paralyzed about three years prior to his death. Mr. Geissenheimer tells you that Mr. Rollwagen said, about three years before his death, he had paralysis, and, as Mr. Geissenheimer testified, he seemed to be very much shattered by it. Another witness states that in the Summer of 1871 he walked as though he had paralysis. All the evidence in the case shows that anterior to this alleged marriage—this formal, ceremonial marriage—Mr. Rollwagen was a paralytic. When Lena Hermann first went to live with him, he was not a paralytic, according to the evidence. She entered his employment in the Spring of 1869. She waits until he is a paralytic old man, impotent and speechless, and then, when he possesses no capacity to explain to the outside world the influences brought to bear upon him and the extent to which he is kept a prisoner in his own house, when mind and body are imprisoned, then this ceremony is performed. Then she has got possession,—absolute and *exclusive* possession of his *person*.

I will call your attention in this connection to some of the letters written by the alleged widow. Lena supposed she had established confidential relations with Mrs. Sheppard. On the 8th of November, 1872, she writes a letter to Mrs. Sheppard in which she says :

“ You want also to know about George. We received already several letters from him. He says he likes it very well. * * * *His father did not wish him to leave.*” (Fol. 5290.)

If his father did not wish him to leave, it is not likely that the old man would object to his return. George is the youngest son. There is no family that does not know that the youngest is very apt to be the pet. The current of affection flows freely from the innermost depths of the hearts of all old people towards the youngest—the latest born. An illustration of this principle is found in the fact that oftentimes grandchildren are the objects of most earnest devotion on the part of grandparents. Rollwagen was an old man, and it was but natural that he should desire that his youngest child should be with him. If that youngest son desired to return to the paternal roof—to the city of his nativity—it would be unnatural that his father should object.

At the time Lena wrote the letters to which I am about to invite your attention, the old man was speechless, and had been for a year or two.

On August 5th, 1873, Lena writes to George :

“ I received your letter, and you state you will come next Fall. *Father will not allow it.*” (Fol. 3169.)

By the next Fall Lena probably expects—as the result proved—that the father would be under the sod. George desires to come home while his father is yet alive ; he is writing about his return, and he says he will come in the course of the next Fall. This sets Lena on fire. The presence of George may thwart her schemes. He may be an eye witness to her plans of fraud. She has the old man a

prisoner in that Bastile; and she desires no relative to enter his presence or interfere with her schemes in regard to his estate; therefore she tells George not to come. She has got a will which somebody has signed. She has sole possession of the old man. She is in a fair way to obtain the Rollwagen estate. So she writes to George that his father will not allow him to come home. Lena further says, in this letter of August 5th:

“He (father) says you went yourself, by your own wish, and so *you shall stay there*. He says he will do no more for you * * * and he says *he does not want you any more at home* to trouble him; you have troubled him enough.” (Fol. 3169.)

What does this mean? The arrival of George would have prevented the execution, perhaps, of the codicil. It would have brought an eye-witness there to watch one who was guilty of such fraudulent practices and devices.

Now she tries to frighten George, so that he will remain away in a far distant State. She says in this same letter:

“If these people in Seventh street arrest you he will not give bail for you, and *he will surely have you arrested*.”

The way she writes indicates that his father would have him arrested, but she probably meant that the people in Seventh street would have him arrested. The substance of that letter is simply this: She is resolved that at all hazards George shall not come home. She appeals to his fears; she states facts which we have no right to assume existed, and which I assume did not exist; she fabricates the facts, and says:

“Do not come; if you do he will have you arrested, and your father wont go bail for you.”

This translated into plain English is: “If you come here you will be arrested and committed *to the custody of your wife*—you will be taken into close custody—and your father won’t go bail for you”; that is the plain English of all

had *no confidence in her virtue!* She says: "He won't trust me!" And then she stated the particulars of an occurrence showing that Rollwagen did not believe in her virtue.

Lena said that on the occasion in question she went out professedly on some matters of business, and Rollwagen, believing that she had gone for improper purposes, rushed after her in his shirt sleeves, and went around the block in pursuit of her (his enfeebled condition must have prevented his going very fast, but he went as rapidly as he could); the door blew to while he was gone, and in that way he got locked out, so that when he returned to his own house he had to go to the neighbor's and enter through a rear window in order to get in his own house. Lena mentioned this circumstance herself. It meant one thing, and one alone—it meant a lack of confidence in her virtue. I asked the witness, Mrs. Sheppard, what the subject of conversation was. She said it was jealousy. I asked her if it had reference to improper intercourse between the sexes. She stated that was the subject under discussion. Mrs. Sheppard said that while she and Lena were talking upon *that* subject, Lena stated that Rollwagen was jealous of her—did not trust her; that he did not believe in her virtue. When was this jealousy? When was it that Rollwagen followed her around the corner in his shirt sleeves? The testimony is silent as to the date. It occurred long before the marriage ceremony, unquestionably; and if her statements are true, it occurred probably at a time when Mr. Rollwagen had sufficient intellect to know what he was about. It was in the Summer of 1872 that Lena told the occurrence; how long before that Summer the fact occurred we have no evidence. We must presume, for the purposes of this case, that it was before the marriage ceremony was performed, because after that time, according to the evidence, Mr. Rollwagen was unable to speak, and unable to chase Lena in that way.

What does this evidence show? A scheming mother! A daughter whom Mr. Rollwagen did not believe to be virtuous. Why should he go after her in his shirt sleeves? She was his niece by marriage, and if she were an improper character he did not want her in his house. Therefore he had a motive in following her. The jealousy of Mr. Rollwagen—whether she was there in the capacity of servant, housekeeper, or niece of his former wife, in whom he had more than an ordinary interest—is a matter to which such weight will be given as it deserves. But this fact is demonstrated beyond all peradventure—that *Mr. Rollwagen believed that Lena was destitute of virtue.*

In this connection I will refer to another incident. When Barbara Sheppard and her mother were here in February, on one occasion Lena went out. The old man could not speak. Whether he had any intellect at that time, we cannot know. But Barbara Sheppard states that when he saw Lena go out, he motioned to her—as she supposed—to follow. He had a certain look which was restless and uneasy. She construed that circumstance as an indication that the old man wished her to follow Lena. To humor or quiet him, she did pretend to follow her. What did that mean? Did it mean that the old man, long after he had lost the power of speech, still having some faint glimmerings of intellect left—enough at least to appreciate that particular subject, if none other—did it mean that Lena Hermann, knowing that he was speechless, misconducted herself before his very eyes? Connect that fact with the circumstance to which I will allude, that, although this man was as impotent, paralytic, and powerless for the purposes in question as any inanimate object, yet within a few days from the time Mrs. Sheppard says that he by his signs indicated to her that he wanted Lena followed;—within one week or less from that time, calculating according to the ordinary period of gestation, Lena Hermann became pregnant! Connect these events together. You have the fact that Rollwagen was *speechless and powerless*. Did she think

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Lena stated to Barbara Koch that she told Mr. Rollwagen that if he did not marry her she would leave. At this time he was perfectly helpless; in 1869 his health was failing very rapidly; in 1870 it became worse; in 1871 he was a wreck. Your Honor remembers our testimony in regard to the Spring and Summer of 1871. Our witnesses show that Rollwagen could not speak. The testimony

shows that he was unable even to control the calls of nature. What reason does she give for asking him to marry her? Evil be to her who evil thinks. She says she told Mr. Rollwagen that if he did not marry her, her character for virtue would be impugned; and people would say that she was a wife *de facto* if not *de jure*. A most remarkable statement! This is what Lena Hermann tells Barbara Koch, during the lifetime of Mr. Rollwagen, and after she claims to have been married. That is significant, because it shows the current of thought of Lena Hermann. She did not state that fact until Mr. Rollwagen was past the power of speech, and could not deny it. But look at the statement. She says that her virtue will be imperiled if Mr. Rollwagen does not marry her! She had lived in his family twenty years before. She had lived with him in Ninth street, when his son George was with him. She had remained there upwards of two years and a half. If her virtue could survive living with Mr. Rollwagen in 1869 and 1870—when his health was so much better than at any subsequent period—what imminent danger could there be after he became so utterly paralyzed and helpless?

It is a false reason. It is the reason of a schemer. It is the reason of a plotter. It is language put into the mouth of a dumb man, because he is powerless to contradict it. The reason for her conduct, on its face, was a false one; and if her reason for the marriage were a false one, we have the right to argue that the whole plan was one of fraud and circumvention. Why did she give that reason? Because she knew that the position of wife to Rollwagen was a fraud on its face. This maiden (she says forty-one in her marriage certificate, but I think she is about half a century old) had lived to that period of life single. Why then does she give out that her virtue is in danger if she lives longer in the family of the husband of her blood aunt without a marriage ceremony? It was an unnatural marriage. It was a marriage that Mr. Rollwagen would not have entered into had he been in his right mind—clearly

not, unless upon compulsion. Lena herself says that *he refused to marry her*. She requested it time after time, and as often did he refuse. She stated that he said he *was ashamed to marry her*. If he did say that, then we must admit that in reference to that observation, at all events, he was sound and rational. "*He was ashamed to do it.*" If he had any mind left, at the time the ceremony was performed, well might he be ashamed. The idea that this niece should seek to establish conjugal relations with the husband of her blood aunt, by whom, to a certain extent, she had been brought up, is something repulsive. Although not so in point of law, yet in morals it was an incestuous marriage if it occurred under the circumstances to which I have adverted. It was a marriage that was unfit and unseemly. Lena Hermann knew perfectly well that so long as the decedent was Frederick Rollwagen, that so long as he was capable of managing his own affairs, he would sooner die than take his wife's niece to the matrimonial couch. I have never known a case in which more shameless scheming and plotting has been brought to light.

In some way or other Lena got Mr. Rollwagen to the Rev. Dr. Busche's. They have alluded to the fact that he performed the marriage ceremony between Mr. Rollwagen and his second wife. I put some questions on that subject which might have pointed to certain facts, but they were not developed, and we prefer to draw the curtain over that subject. It is not before the Court. The fact however came out on the examination of Dr. Busche that he went to the house and married the second wife; that he made one call afterwards, and that was the extent of his acquaintance.

A marriage ceremony between Lena and decedent was undoubtedly performed. Mr. Busche, judging from his habits, thinks that Mr. Rollwagen must have responded. Whether he did, is not the subject of inquiry here. For the purposes of this case, we take the marriage certificate for what it is worth. The question of the marriage, and the

question of legitimacy, are not before the Court for specific adjudication in this case ; although the question of legitimacy has a strong incidental relevancy with reference to the undue influence, fraud and circumvention practised upon the decedent, and to that extent is a subject proper to be brought to your attention and commented upon. At all events, the marriage ceremony was performed. Two and a half years before this event, Lena had managed to get Louis Rollwagen and his wife out of the house. The next thing is to get George away ; that is accomplished within about a year of the marriage ceremony. Lena Hermann is installed in full possession of the residence of Mr. Rollwagen. She becomes his agent for the purpose of business. She is the interpreter between him and the outside world. The people who come to the house to see him, can only talk through Lena Hermann. The old man, at the time of the marriage, according to Lena Hermann's own admission, was a paralytic. She stated to Dr. Tully that he was paralyzed about three years prior to his death. Mr. Geissenheimer tells you that Mr. Rollwagen said, about three years before his death, he had paralysis, and, as Mr. Geissenheimer testified, he seemed to be very much shattered by it. Another witness states that in the Summer of 1871 he walked as though he had paralysis. All the evidence in the case shows that anterior to this alleged marriage—this formal, ceremonial marriage—Mr. Rollwagen was a paralytic. When Lena Hermann first went to live with him, he was not a paralytic, according to the evidence. She entered his employment in the Spring of 1869. She waits until he is a paralytic old man, impotent and speechless, and then, when he possesses no capacity to explain to the outside world the influences brought to bear upon him and the extent to which he is kept a prisoner in his own house, when mind and body are imprisoned, then this ceremony is performed. Then she has got possession,—absolute and *exclusive* possession of his *person*.

I will call your attention in this connection to some of the letters written by the alleged widow. Lena supposed she had established confidential relations with Mrs. Sheppard. On the 8th of November, 1872, she writes a letter to Mrs. Sheppard in which she says :

“ You want also to know about George. We received “ already several letters from him. He says he likes it very “ well. * * * *His father did not wish him to leave.*” (Fol. 5290.)

If his father did not wish him to leave, it is not likely that the old man would object to his return. George is the youngest son. There is no family that does not know that the youngest is very apt to be the pet. The current of affection flows freely from the innermost depths of the hearts of all old people towards the youngest—the latest born. An illustration of this principle is found in the fact that oftentimes grandchildren are the objects of most earnest devotion on the part of grandparents. Rollwagen was an old man, and it was but natural that he should desire that his youngest child should be with him. If that youngest son desired to return to the paternal roof—to the city of his nativity—it would be unnatural that his father should object.

At the time Lena wrote the letters to which I am about to invite your attention, the old man was speechless, and had been for a year or two.

On August 5th, 1873, Lena writes to George :

“ I received your letter, and you state you will come next “ Fall. *Father will not allow it.*” (Fol. 3169.)

By the next Fall Lena probably expects—as the result proved—that the father would be under the sod. George desires to come home while his father is yet alive ; he is writing about his return, and he says he will come in the course of the next Fall. This sets Lena on fire. The presence of George may thwart her schemes. He may be an eye witness to her plans of fraud. She has the old man a

prisoner in that Bastile; and she desires no relative to enter his presence or interfere with her schemes in regard to his estate; therefore she tells George not to come. She has got a will which somebody has signed. She has sole possession of the old man. She is in a fair way to obtain the Rollwagen estate. So she writes to George that his father will not allow him to come home. Lena further says, in this letter of August 5th:

“He (father) says you went yourself, by your own wish, and so *you shall stay there*. He says he will do no more for you * * * and he says *he does not want you any more at home* to trouble him; you have troubled him enough.” (Fol. 3169.)

What does this mean? The arrival of George would have prevented the execution, perhaps, of the codicil. It would have brought an eye-witness there to watch one who was guilty of such fraudulent practices and devices.

Now she tries to frighten George, so that he will remain away in a far distant State. She says in this same letter:

“If these people in Seventh street arrest you he will not give bail for you, and *he will surely have you arrested.*”

The way she writes indicates that his father would have him arrested, but she probably meant that the people in Seventh street would have him arrested. The substance of that letter is simply this: She is resolved that at all hazards George shall not come home. She appeals to his fears; she states facts which we have no right to assume existed, and which I assume did not exist; she fabricates the facts, and says:

“Do not come; if you do he will have you arrested, and your father wont go bail for you.”

This translated into plain English is: “If you come here you will be arrested and committed *to the custody of your wife*—you will be taken into close custody—and your father wont go bail for you”; that is the plain English of all

this stuff. Let us see what else she says in this same letter:

“Regards from your father, and he says *once more you shall remain there*—here is nothing for you.”

Lena on the 20th of August, 1873, again writes to George a letter in which she says:

“George, your father says once more *you should remain there*. It is better for you than here.” (Fol. 3172.)

Your Honor recollects what was stated in the authorities read in regard to the absence of relatives at the time of the execution of wills, and particularly as to the absence of those whose rights are compromised, and who are prejudiced by testamentary instruments executed under such circumstances.

Then again look at the *continued flow of falsehoods in respect to the decedent's health*.

On December 6th, 1872, Henry Hermann writes to George:

“Your father's *health is very good at present*, but Lena has “been very sick for the last five weeks; it will take two or “three weeks more before she can be around again.” (Fol. 3428.)

Observe the concert of action between Lena and Henry. The two write that Rollwagen's health is good. This letter was written not long after Rollwagen had returned from Verona; all the proof shows that his health was constantly growing worse. Your Honor recollects the testimony as to his condition in the Summer and Fall of 1872. In this same letter Henry Hermann says:

“Your father wants you to write your letters *in the German language, so that Lena can answer you again*.”

She wants to communicate with the outside world; she is determined that Rollwagen shall only communicate through her; she has got possession of the estate, and

now she wants to receive all the letters addressed to him, and to answer them.

Henry Hermann states that she understands German better than English, and for that reason George must write his letters in German, so that she can answer them.

On the 23d of April, 1873, Henry Hermann says in a letter to George:

“Your father is about the *same as usual*. He intends to “go to some bathing place this summer for about two months. The doctor thinks it will benefit his health a “great deal.” (Folio 3432.)

At that time two months had elapsed since Lena had written to Barbara Sheppard, stating that never again would Mr. Rollwagen be able to visit them. She knows that he is doomed never to leave the city again alive, and yet Henry Hermann writes that his health is substantially good—about the same as usual. Lena had previously written several times that his health was as good as when George left. In February, 1873, Lena wrote Barbara Sheppard as I have already stated.

On the 8th of July, 1873, Hermann writes to Mrs. Sheppard, *in the name of Mr. Rollwagen*, on this subject; *he now writes Mr. Rollwagen's letters, and signs his name to them*. He had before written that Mr. Rollwagen was about to go to some watering-place, for the purpose of giving George the idea that he was well enough to travel. Barbara Sheppard has written to Mr. Rollwagen, and Hermann answers the letter in Rollwagen's name. He says:

“I am not going in the country this summer, for it is “rather hard to go traveling for a man *in such bad health* “*and condition which I am*, so I concluded to stay at home, “which is the best place for me to feel comfortable; my “health is about the same as usual; my wife is at present “in good health.” (Folio 5258.)

Henry Hermann writes one kind of letter to George, and a letter directly the opposite in spirit and meaning to Barbara Sheppard; he could not deceive her so well, because

she had with her own eyes witnessed his condition, and knew that Mr. Rollwagen's health was very poor, and that he was probably very near his grave.

In August, 1873, Lena writes to George in regard to Mr. Rollwagen's health, and says: "Your father *is still in the same condition as you left him.*" (Fol. 3170.)

What a burning falsehood! All the evidence in the case proves that at that time he was very much reduced, weak, exhausted, barely *alive*, in fact; yet she writes that he is *as well as he was the year before.*

On the 20th of August, 1873, she writes to George:

"Regards from your father; *he is still in the condition you left him.*" (Fol. 3173.)

Why these falsehoods in regard to his health? *The object was to keep his relatives away from him.* George was in California, and if he should come back she had every reason to believe that he would again return to his father's house, and so would be an eye-witness to the plots and schemes which she and her family were concocting.

To such extent did Lena carry her scheming, that she would not even permit Rollwagen's barber—Stephans—to come and cut his hair. Stephans had been his barber for fifteen or twenty years. She herself turned barber, and cut his hair. Why? It was because she desired that none of his friends and the friends of his family should be near him.

Your Honor has heard read the doctrine laid down by the highest authorities, that where those who are interested in the distribution of the estate of a party upon his death are excluded from the room at the very time of the execution of a will, that that is one of the evidences of fraud and chicanery which render a will absolutely void. How much more strongly does the principle apply when for years the sons and grandsons of the decedent are not allowed to see him for one moment, *except in the presence* of this lynx-eyed, cunning woman, Lena Hermann! *It is an uncontradicted*

*fact in this case, that for two years or thereabouts, which embraces the period of the alleged married life of Lena and Mr. Rollwagen, she would not permit any relative of his who was entitled, in the event of his dying intestate, to participate in the distribution of his estate, to see him for a moment except in her presence. We have proved this by a host of witnesses. Your Honor recollects that, on the occasion of the visit of Barbara Sheppard and her mother, at one time the family were in the kitchen dining; the sister of the decedent had been left in the room with him; she came down, and at that time Sammy Browning, a grandson, entered the house and started to go up to his grandfather's room. The testimony is that Lena, in an excited manner, jumped from the table and ran upstairs, saying, "Father does not wish to be left alone with any of the children."** She would not allow even this young grandson, an intelligent, interesting young man, nineteen years of age, of whom I presume the decedent, while his intellect remained, was fond, and of whom anyone might well be proud,—she would not allow even him to be alone for an instant with his grandfather. She made the false excuse that "Father does not wish to be left alone with any of the children." She said this to Barbara Sheppard. That is undisputed. Why did she tell Barbara so? She talked freely and confidentially with her. Is the statement of Barbara Sheppard true? Most unquestionably. Lena is bound by it. Lena in this matter has spoken through the mouth of Barbara Sheppard. Lena would not go upon the stand to contradict it for the reason that it was true.

We have proved by Barbara Sheppard that, during the entire period she was there, which embraced a week or thereabouts, Frederick Rollwagen, Jr., and Louis Rollwagen, and their families, called, and that the grandchildren—the Browning children—called also; they were there repeatedly; and yet in no solitary instance were they, or any

* See Folios 2758 to 2761.

of them, permitted to see Rollwagen alone.* We proved this same state of facts by other witnesses. It is a conceded fact in this case, that this woman would not permit Rollwagen for one moment to see any of his children alone. Whenever Frederick or Louis came there, no matter where she was when they entered, she would, as if by magic, instantly appear. The very moment the door opened and they stepped inside the house,—the moment they were under the parental roof,—that moment appeared this woman; and while they remained she hung about them like a shadow; she went with them everywhere; she played female detective upon them. If, notwithstanding her cunning and fraud, she should lose what she claims to be her portion of this estate; if she should still exhibit a tithe of the skill in another sphere, the Chief of Police would doubtless be glad to engage her as a female detective. She would earn a good salary, because of her sleepless, untiring vigilance. She has a decided talent in this respect.

Lena would not even trust the servant to open the door, as a general thing, so fearful was she that, by accident, some of the sons or grandchildren of this man should see him alone; and therefore, whenever it was in her power, she would go to the door herself. We proved this state of facts by Pfleger, by Hahn, by Arnold, by Werner, and by Barbara Sheppard and others.

In this connection I wish to call your attention to a single extract from the decision of the Court of Appeals in *Tyler v. Gardner*, in reference to the presence of those who are entitled to participate in the estate at the time wills are executed, or plans are being formed for their execution. Judge PORTER says (p. 393) :

“The studied privacy attending the preparation and execution of the will, the constant presence and vigilance of the principal beneficiary, and her omission to advise the

* See *Police* 2762 to 2766.

“son and grandson of her mother’s approach to death, are
 “familiar and marked *indicia* of the exercise of undue influence, under circumstances like those developed by the
 “evidence (*Crispell v. Dubois*, 4 Barb., 397; *Delafield v. Parish*, 25 N. Y., 41, 42). Swinburne, with his usual quaint
 “and pithy directness, speaks thus of the inferences deducible from this species of evidence: ‘If the wife, being
 “made executrix, or any other person benefited by the testament, understanding that the testator is about to alter
 “his will, will not suffer his friends to come unto him, pretending, peradventure, that he is fast asleep, or in a slumber, or the physician gave in charge that none should
 “come to him, or pretending some other excuse, or else, all
 “excuses set apart, do, for charity’s sake, shut them forth
 “of the doors,—in these cases the testament is void, in detestation of such odious shifts and practices.’”

I will invite your attention to certain other features of the case. At the time Barbara Sheppard is here in February, 1873, Lena states to her that she is going to get possession of the Rollwagen estate; she says that she will have Beers turned out of the agency, that she herself will collect the rents for a short time, and then her brother will be installed as agent.

I will quote the exact evidence on this point. Mrs. Sheppard testifies:

“She (Lena) said Mr. Beers they were going to have out, and she was going to collect the rents for a few months, and have her brother and her mother come into the family, and her brother was going to oversee the agency.” (Fol. 2742.)

In pursuance of that scheme (and it is wonderful the extent to which Lena unfolded her schemes, as the testimony proves that she did), Henry Hermann, as he testifies, became agent of the Rollwagen estate on the 15th of April, 1873. You have heard Hermann’s testimony on this point. He tells you that this old man, although he was dumb, said to him that he wanted him as agent instead of his son

Louis, who desired to act in that capacity. There is nothing in the case to show that the father's relations with Louis were not of the most cordial character. It was natural that he should select Louis, and he certainly would have done so had he been in the possession of his senses, and of sufficient power to communicate his thoughts. Henry Hermann says that Louis is not responsible. But he is quite as responsible as Henry Hermann for all that appears in the evidence. Who was Henry Hermann? He was a poor man. He testified that at this time he was worth but two thousand dollars. He had no visible property, except a little stock in a little grocery. He says that he had money in the bank. Why should he be selected as agent of the estate? There is no reason except in pursuance of the general scheme unfolded to Barbara Sheppard in February, by which Lena was to continue in possession of the *person* of Rollwagen, and obtain possession of the *estate* as well.

Before I go to that branch of the case, however, I ought to call your attention to the fact that while Lena prevented access on the part of the Rollwagens and their friends to the decedent, she was very free to permit her own partisan friends to attend him and to be with him to any extent. Mrs. Schmoll, who has given such extraordinary evidence, says that she was permitted to stay alone with him hour after hour, and for any length of time. Mrs. Perry was frequently alone with him. Mrs. Schmoll says that when Mr. Rollwagen had been married a short time, as she claims, he told her that he supposed his children would "go on awful about it,"* and that she said to him, "*What need you care for them?*"† Lena was quite willing to expose Mr. Rollwagen to the influence of one who would seek to disparage his children in conversation with him. While I contend that Mr. Rollwagen never had that conversation, yet it shows the thoughts of Lena,—for Mrs. Schmoll reflected the

* See Folio 4367.

† See Folio 4368.

wishes of Lena. She was her friend, and I have no doubt from the evidence that Mrs. Schmoll exerted herself to prejudice this man (if he had enough intellect left to be prejudiced) in respect to his children.

What are the claims of Lena Rollwagen or Lena Hermann to this estate? The Court of Appeals held that in all such cases it was proper to show the fraud from the instrument offered for probate, especially if such instrument is unjust. More unjust instruments than are propounded here for probate never were gotten up. If Lena were married to this man, she would be amply provided for. It is in proof that his real estate exceeded half a million of dollars, and her income from her dower interest in it during her lifetime—if she were really married—could not yield less than twelve or fifteen thousand dollars per year. The income of Rollwagen's real estate at the time of his death was forty thousand dollars per year, so that, by the accident of marriage, if the marriage were a legal one, she was amply provided for. We have evidence as to her style of living, from which we can infer that she probably never, before her alleged marriage, spent so much as two hundred dollars per year. She lived in the cheapest possible manner. Now, when she is married, as she claims, and by the accident of marriage becomes so well off, although she has far more than she could ever reasonably have hoped for—she is provided for far beyond her deserts—yet, not content with sudden affluence, she seeks to practically absorb almost the whole estate. By her marriage she would be provided with a competency as great, probably, as Mr. Rollwagen would have provided for the mother of his own children. The mother of his children would not have asked a greater provision for herself than the dower interest allowed by law. It was more—far more—than entirely ample, in view of the size of Mr. Rollwagen's estate. Lena, therefore, had no excuse for this wholesale robbery. She had no claim whatever upon Rollwagen. She performed, as she alleges, menial services. It is claimed that she insisted upon acting

as his body servant; she would not permit this man of ample means to have a suitable servant to attend him and minister to his wants. Why? Because *she was determined that no one but herself should be near him*; she feared that a body servant might tell tales. When this man had an income of forty thousand dollars a year, which she and Henry Hermann were collecting, why was he not permitted to have servants, who, under the control of Lena herself, could take proper care of him? If Lena had any regard or affection for him, she could exhibit her tenderly kindness just as well—in fact, much better—by allowing him to have suitable servants, than by officiating as a body servant herself. The inquiry in this connection has extraordinary significance: Why did Lena, when she was pregnant, perform such services, which required remarkable powers of endurance and great muscular strength? Why, unless she thought it indispensable, in order to further her schemes, that she should have sole possession of his person? It is most extraordinary that no inducement could tempt her to forego the performance of such menial services. She seemed to think these services were a necessary part of the scheme for the robbery of Rollwagen's estate. She is no more fastidious in her logic than in her habits and tastes. Because she had so often to clean Rollwagen, she thought that while she was about it she might as well *clean out his whole estate*, and therefore she got up a will and codicil which virtually absorbs the whole of it.

Mark the fraud of this woman. If any fact can be established by evidence, the impotency of this man is clearly proved. It could not be more conclusively established if we proved that Rollwagen had been dead and in his grave for years before the child Magdalena, the younger, was born. The fact that he is not the father of this child could not be more conclusively demonstrated. And yet, look at the cunning of this woman! This child was a part of the scheme to rob his estate, or rather the portion of it not absorbed by the will and codicil. Your Honor remembers

that in some of the reports of criminal cases it appears that sometimes, when a burglary is about to be committed, young children are put into a building through a small aperture so that they may unlock the door to the burglars. You remember the experience of *Oliver Twist*. The boy was put through an aperture into a house, so that he could let in the burglars; but the brave little fellow refused to perform the task assigned him; he stood and took the fire of the owners, and was carried off wounded. But this is the first instance where a child has been begotten for the purpose of robbing an estate. The time selected is the latter part of February. Lena calculated the time of the burial of decedent (he had long been practically dead) with such unerring accuracy, that her child first opened its eyes to the light after Rollwagen had been under ground six weeks. He was, to all intents and purposes, deaf for years. For the last year or two or more he was dumb. Lest he might in some way learn the fraud, lest before he shook off "this mortal coil," by some miraculous power of speech, he might out with the truth, and on his part deny the paternity of the forthcoming infant, the time of its inception was so arranged that it would remain imprisoned in its mother's womb until after the paralytic Rollwagen should be under the sod. Had Rollwagen known the fraud he could not expose it. The child she carried in her womb was no more imprisoned, no more helpless, no more dependent upon her than the child near seventy years of age, who was the father of three living children and the grandfather of eleven living grandchildren, none of whom were permitted to see him except in presence of his jailor, Lena Hermann.

In the latter part of February, 1873, Mrs. Sheppard and her mother came to this city to see Rollwagen, believing from Lena's representations in her letter that he was about to die. And yet no sooner do they arrive here than Mr. Rollwagen gets a little better, although scarcely able to sit up, except long enough to have his bed made; and *Lena within a week or less from that time becomes pregnant!*

I refer to these facts simply for the purpose of showing that they are all part and parcel of the general scheme of fraud.

The testimony is now in, and it is proper that your Honor should consider it. As to Lena's pregnancy, it is a remarkable fact that, according to the evidence here, Lena never made known her condition to any of Rollwagen's relatives, or to anyone who had an interest in knowing the fact. She kept it a profound secret until after his death. Why? Because she knew perfectly well that had that fact been known, a medical examination of this old man would have demonstrated, beyond all peradventure, that it was impossible—physically, absolutely, unqualifiedly impossible—that he should be the father of the child known as "Magdalena the younger." It would have been demonstrated by as many medical witnesses as would be called to examine him; and the fact would stand out as clearly as that his right arm was paralyzed. Therefore she keeps the fact of her condition a profound secret from all who have an interest in knowing it.

Barbara Koch's opinion on this subject is orthodox. She heard of Lena's pregnancy not long before Rollwagen's death. In her quaint way, and in rather broken English, she expressed her amazement to Henry Hermann. She testified:

"I told him that at this time, when Mr. Rollwagen was so *near dead*, that I said it was very funny that she had not *been before*." (Fol. 3080.)

Barbara Koch knew Rollwagen's condition well during the last two or three years of his life. No one would be more likely to have a correct opinion, in regard to whether Rollwagen could, by the remotest possibility, be the father of the child in question, than Barbara Koch. Her opinion on this subject was most positive and emphatic; she expressed it, without reserve, to Henry Hermann after the death of Mr. Rollwagen. On this subject she testified:

"I told him (Henry Hermann) once, that *if I hear a hundred men together, you cannot get two that believe that Mr. Rollwagen to be the father of that young one.*" (Fol. 3081.)

Lena, with the usual fatality that accompanies moral as well as legal crime, has proved her guilt through the witnesses in this case to whom she had made statements. There is hardly a step in this case that we do not prove by Lena's admissions. It is a part of the plan of Providence, that those who commit crimes shall be the instruments of their own conviction, and that they shall furnish the evidence of their own guilt. Lena has furnished the evidence to convict herself here; her lips have told the tale of infamy, of wrong, of moral crime. Throughout this case, whenever she has tried to overthrow the proof of actual facts, instead of doing it she has established those facts. Her whole case is weighted down with fraud which she herself has established. *She has admitted Rollwagen's impotency.* After, as she claims, they were married, a conversation occurred in which Lena stated, in so many words, that Mr. Rollwagen was impotent. She stated that he would not marry until after he became impotent (fols. 3045 to 3048). These are the declarations of Lena, coming from her own lips, given in evidence by as truthful a witness as ever stepped upon the witness stand. In addition to the fact proved by so many witnesses, that Rollwagen was powerless for two or three years, that he was physically prostrate, that he was in such condition that it was absolutely impossible that he should become the father of a child, we have Lena's own declarations, sworn to by a credible witness. Lena did not go upon the stand to gainsay the truth of a word that this witness has uttered. Connect this with the fact that Mr. Rollwagen believed her not to be virtuous, as she herself admitted. She has admitted that Rollwagen was impotent, and that he believed her not to be virtuous.

If a fact be true, there is a beauty and symmetry about it which enables it to be fitted in with any and every other

fact in the case. There is that about truth which those accustomed to judicial proceedings cannot mistake. Let plaintiff or defendant, let the proponent or the contestant attempt to establish a fact which is false, and facts will spring up all around him to show its falsity. There is a beautiful theory that every truth in the universe harmonizes with every other truth, thus creating a symmetrical whole. Weighted down as this case is with fraud, an attempt has been made throughout to explain away actual, unyielding, stubborn facts. There has been an attempt to explain in regard to this illegitimate child, and what was the explanation? It appears by the testimony of the other side that Mr. Rollwagen, if what the witnesses say be true, acknowledged the paternity of this child. On this, first you have the testimony of Mrs. Miller. If ever from the bottom of my heart I pitied an old woman, it was when she was upon the stand. When she gave her evidence every man and woman in the court-house felt that perjury was flowing freely from her lips. She stated that which was a physical impossibility. When I undertook to test her on cross-examination, your Honor heard the answers she gave. She said that Mr. Rollwagen, at a time when he was speechless, made a confidant of her, and early in April, 1873, he told her that he was the father of the forthcoming child. Had the fact been so, there is no reason to suppose that this man, who could not talk to his children, who could not speak to his relatives—to his sister, his niece, or his friends of twenty or thirty years' standing, and whose friends gradually ceased calling upon him because he could not speak; if this were the fact, that he was the father of the forthcoming child, which was to be born after his death, there is not much reason to believe that to this old woman his mouth would be opened, that a miracle would be performed by which, while he was dumb to others, he would be garrulous and loquacious to her. What does she say? She, mark you, is now in the employ of Lena. That fact shows the cunning of the woman who brings her

poor old wash-woman here, who had been in the employ of the Rollwagen family, at times, for a great number of years. Mrs. Miller in her poverty is probably very glad to get the wages which this expectant millionairess widow is willing to dole out to her for her services at the wash-tub.

Lena, who has attempted to wade through filth to fortune, brings here this witness—this venerable cleanser of foul apparel—to wash out the moral filth, to cleanse her case from the deep stains of moral crime which have been so conspicuous from the beginning of this investigation. Lena thinks the veteran of the wash-tub can, on the witness stand, so skilfully utter the falsehoods coined by the Hermanns, that the attempt to soft-soap the Court will be successful. Instead of this, the Hermanns will soon realize the fact that they have got themselves in very hot water.

Was ever a witness so overloaded as Mrs. Miller? She swears to an amount of moral and physical impossibilities absolutely astounding. A man who had long been dumb, she made glib of tongue—fluent of speech; a man who was paralytic, whose vitality had been fast ebbing away for years—then in the last stages of exhaustion, without life sufficient to move a finger or make an audible sound—she caused to arise from his bed, dash his arms wildly around, and exhibit muscular strength that would almost do honor to an athlete; a *paralytic, impotent old man*, who for purposes of intercourse had been dead years before the child was conceived—under ground months before it was born—she made the father of the child; long, long after he was dumb, she made him acknowledge its paternity; she swears she heard him speak in exultation of the fact that Lena was pregnant; and so much did he know of her condition that, six months in advance of its birth, he proclaimed the sex of the child. Mrs. Miller says Rollwagen told her, the third month after Lena conceived, he “had fixed a boy.” It would seem that thus early Lena thought that, if a dead man like Rollwagen could fix *one* boy, a live woman like

her could fix *three* boys like Frederick, Louis, and George Rollwagen. She has learned that all this was a mistake; instead of Rollwagen at that time having fixed a *boy*, somebody (who we will not now say) had fixed a *girl*. Lena has found by this time that somebody in February, 1873, failed in the effort to fix a *boy* for her. She will in time learn that her efforts to fix Rollwagen's three boys are futile; instead of fixing three boys, she will find that her efforts have resulted in fixing *one* girl—one old girl—a remarkable girl—in short, the old girl of the period; and her name is Lena Hermann.

The attempt to explain away the illegitimacy of this child has been singularly unsuccessful. The attempt to ascribe to Rollwagen declarations amounting to an acknowledgment that he was its father, has utterly failed. The declarations ascribed to him are so incongruous and absurd that it may not be amiss to call your Honor's attention to some of them. When we bear in mind that, at the time Mr. Rollwagen is alleged to have made these declarations, he had utterly and forever lost the power of speech, it will not be a source of surprise that these declarations or statements are not consistent with themselves, nor with the established facts of the case. By a curious anachronism, Mrs. Perry dates Lena's pregnancy in the Fall of 1871; she makes Rollwagen acknowledge it at that time. She testified as follows: -

" Q. What did he [Rollwagen] say ?

" A. He told me he was married.

" Q. Did he tell you anything else ?

" A. He told me that he would have another heir.

" Q. That was in the Fall of 1871, after he was married ?

" A. Yes, sir." (Fol. 4214.)

Mrs. Miller was called as a witness to prove that Rollwagen, before he died, acknowledged the paternity of this remarkable child; she put into his mouth declarations

more extraordinary than those to which Mrs. Perry testified. Mrs. Miller testified on this subject as follows :

“ Q. What did he say ?

“ A. He wished to live *so long as he could see the baby*.

“ Q. Did you hear him say or speak about the baby more than once ?

“ A. Yes, sir, he often said so ; that he wished to live a couple of years longer.

“ Q. By that time he could see the baby ?

“ A. To see the baby.” (Fols. 4108-9.)

According to this evidence, the period of gestation began in the Fall of 1871, and, according to Rollwagen's declarations, he expected the child to be born some time in the year 1875. That the period of gestation should be four years is rather remarkable, although not so extraordinary as some other facts testified to by Mrs. Miller, Mrs. Perry, and Mrs. Schmoll. If Rollwagen, at any time or in any way, acknowledged that he was the father of this child, his declarations would have some consistency ; the testimony would not present such peculiar incongruities and absurdities. The story told by these witnesses for the purpose of imputing to Rollwagen the paternity of “*Magdalena the younger*,” is as absurd as the insane notion entertained by a married lady, of which an account is given by Montgomery, one of the most brilliant of medical writers, in his work on pregnancy. The lady in question was afflicted with the delusion that she had been pregnant for eighteen years. Alarmed at this long and unprecedented period of gestation, she consulted an eminent physician and insisted on being advised *as to what she should do* in her distressing situation. The physician said to her, “ I think, Madam, the best thing you could do would be to swallow a private teacher for your son, or his education will be sadly neglected.”

At the time of the conception of this child Rollwagen was almost at the point of death, and was not able to stir or move in bed except as he was lifted by others. This is

admitted by Lena. Barbara Sheppard testifies that on this subject Lena

“ Said he [Rollwagen] had been very helpless and powerless, and required a great deal of help, and she had worn herself out in taking care of him. * * * * *
 “ She had to lift him around in his bed from one side to the other as well as she could. * * * * *
 “ She said that he was so heavy it strained her back very much; in fact, she said, it seemed as though she would break her back lifting.” (Fols. 2749 to 2751.)

Barbara Koch testified to the utterly helpless condition of decedent from the time his sister and niece, Mrs. Sheppard, were here in February, 1873, to the period of his death. She states that during this time he was utterly unable to move himself in bed. She testifies on this subject as follows :

“ *She [Lena] had to get on the bedstead and stand up across him, and take and lay him around on the other side. I saw this about the time his sister was down here.* * * * * *
 “ Q. Was he ever able to move any after his sister and niece were here in February, 1873?
 “ A. *No, sir; he was not able to move himself, but she had to do it.*” (Fols. 3051-2.)

This testimony relates to the precise time when this child was begotten. *It is proper that I should refer your Honor to a fact stated by Barbara Koch at folio 3050, which, taken in connection with the other evidence, is conclusive upon the subject under discussion, viz., that Frederick Rollwagen, the decased, was not the father of Magdalena the younger.*

Lena attempted to give the solution of this whole matter: she knew it needed explanation, and so she entered into a luminous explanation, which she said emanated from the brilliant brain of the physician in attendance. When Barbara Koch remarked that it was “very funny” that this dead man should exhibit his death-like qualities in that particular way, Lena said that it never would have happened but that it occurred just after Barbara Sheppard and her mother were there, and she never would have

got in that condition but for the fact that she was weak, exhausted, and worn out. Lena's notions on this subject are peculiar, as well as original. Barbara Koch testified as follows:

"Q. Did she say anything in relation to it, the time when his sister and niece came down in February last?

"A. She told me once. It came up this time after she was sick, that she got this way [pregnant] after she was sick.

"Q. State what she said about that?

"A. She said she could not believe it was, and she asked the doctor about it, and the doctor said that is the reason she had it on account of being weak from the sickness, and she would not be this way only from the sickness." (Fols. 3082-3.)

The attempt to make it appear even *plausible* that Rollwagen was the father of the child in question is futile, for the simple reason that it is an effort to establish a physical impossibility. It is part and parcel of the general scheme of fraud, and for that reason I am obliged to comment upon it. The undisputed facts in this case, including the express admission of Lena herself, prove beyond all peradventure that at the time this child was begotten, and for a very long time before, Rollwagen was impotent, and by no possibility could have been its father.

Why, Sir! *Upon the undisputed, uncontradicted, conceded facts in evidence, it would have required the strongest galvanic battery known to science to give him even the semblance of sufficient vitality for such an occasion.*

I will next invoke your attention to the proof of undue influence brought to bear on the decedent in reference to the signing or execution of papers.

Here Lena has again furnished the evidence of her guilt. She told Henry Heynemann, the gas collector, that she would permit Rollwagen to sign no papers except such as she ap-

proved; and this was within a few days of the date of the will. On this subject Mr. Heynemann testified:

"The time I was up-stairs she (Lena) told me that papa would not do anything unless she was satisfied with it.

"Q. Would not do what?

"A. *Would not sign any papers.*

"Q. Which time was that?

"A. The 3d of July, 1873." (Fols. 1305-6.)

* * * * *

"She (Lena) said that he (Frederick Rollwagen, jr.) came in with Mr. Langbein, or some lawyer, and wanted Mr. Rollwagen to sign some papers, and that he did not do it; that Mr. Rollwagen wanted to do it, but she told him not to do it, and he did not do it." (Fol. 1307.)

Where the issue of undue influence is raised, the point to be considered is whether the party who is benefitted by the will has exercised undue influence over the decedent, and whether that undue influence, if exercised, has had any controlling effect in relation to the will. Here is an express admission by Lena that she exercised supreme and absolute power over the decedent in regard to the signing or execution of any papers whatever; she admits, in so many words, that she will not allow him to execute any papers except those of which she approves. Here, therefore, is an express admission on her part of the exercise of that which, under the circumstances, the law denominates undue influence. If the decedent possessed mental capacity sufficient to be operated upon by such influence, then on this branch a clear case of undue influence is established.

In this connection I will invite your attention to the testimony of Henry Hermann; he stated that the lawyer who was acting professionally for Mr. Rollwagen desired that a legal paper should be signed. This was an Answer in a suit. Henry Hermann says that the decedent kept the paper over night, and would not permit it to be used until he (Henry Hermann) had examined and approved it. On this subject he testified as follows:

"Q. Did Mr. Rollwagen say anything to you about some papers that Mr. Langbein brought there?

"A. Yes, sir.

"Q. What did he say about them?

"A. He said it was an Answer, I believe, to put in against that suit, and he had the paper over night; that he wanted the paper signed, but he would not sign it until he had seen it, *and let me read it to him.*

"Q. Did you read it to him?

"A. Yes, sir; I did." (Fol. 4963.)

In relation to this matter Hermann testified on cross-examination, as follows:

"Q. Did he (Rollwagen) say that he wanted your opinion about it?

"A. That was what he wanted, it seems.

"Q. Did he say it was a law paper?

"A. Something about a suit.

"Q. Did he say it was a law paper?

"A. Yes, sir. (Fol. 5197.) * * * * *

"Q. After you had read this law paper, did you give him any legal advice as to whether it was proper for him to sign it?

"A. The only thing he asked me was *if he could sign it*—*if it was all right, and I told him he could.*" (Fols. 5198–9.)

If these statements be true what more proof would be necessary, not only of *undue* but of *despotic* influence exercised over a party? If they possessed the controlling influence over the decedent which Lena admits she exercised, and which Henry Hermann testified that he had, then the decedent would be permitted to execute no will except such as Lena and Henry Hermann might desire.

Your Honor will remember that Mrs. Sheppard stated that after (or just before) the funeral the subject of a will was spoken of, and she stated that Lena said that Frederick or some of the children wanted a power of attorney. Lena stated that had there been a power of attorney that would break the will. Connect with that the evidence which shows that she did her utmost to prevent Mr. Rollwagen from giving a power of attorney, assuming that he was able to do so, and we have the key to her motive.

I will next call your attention to evidence of proponents which, if true, shows the influence brought to bear on decedent for the purpose of operating upon his fears, and thus increasing his abject dependence upon Lena.

Mrs. Schmoll testifies that in the Summer of 1873 the decedent, when speaking of Lena, said that if she should die, he would have to go to the hospital; she says she told him that he could go to his sons, and he replied that he would not. (Fol. 4391.)

This is the only declaration throughout the whole case, put into the mouth of Rollwagen, which even tends to show any want of cordiality on his part towards his children. That he did not make this declaration is shown by the evidence establishing the fact, that at this time he could not speak at all. It has been already shown that Mrs. Schmoll testified to so many physical impossibilities that her testimony must be discarded. But suppose the evidence to be true, and that decedent was in that frame of mind which such declaration would indicate. If such were Mr. Rollwagen's feelings towards his children, *who* produced that condition of mind? *Whose* influence was efficient in that respect? It was the influence of Lena. She was with him at all times—night and day. No one could have access to him, or produce any impression upon him, unless through her and by her direct agency.

Proponents attempted to prove by Mrs. Miller that decedent thought his life depended entirely on Lena. She testifies that Mr. Rollwagen said :

“ If he had such care as he had from Lena he would have “lived longer.” (Fol. 4100.)

In regard to Henry Hermann, this witness testified as follows :

“ Q. Did you hear Mr. Rollwagen speak of Henry Hermann ?

“A. He loves Hermann—he is a good boy, and he loves “him.” (Fol. 4126.)

It is singular that all the evidence tending to show extraordinary fondness on behalf of decedent for Lena and her relatives and friends, comes from the “Three Graces” —Mrs. Miller, Mrs. Perry and Mrs. Schmoll. All the evidence tending to diminish the strength of the affection and cordiality of Mr. Rollwagen for his sons comes from the same source. Even on this point the utmost extent these witnesses, who are *intensely willing* to testify in favor of Lena, will go in their evidence, is to put into the mouth of Rollwagen declarations to the effect that he did not love his sons’ wives. These witnesses do not testify that Mr. Rollwagen ever said that he did not love his children and grandchildren. I will not here stop to discuss the improbability, or, rather, the impossibility of Rollwagen, at a time when he was speechless, discoursing so freely to his washerwoman (with whom he was never on any terms of intimacy), and with other persons outside his own family, as to the degree of his fondness for his daughters-in-law.

But suppose the evidence is true, and the love which he did not bestow upon his sons’ wives was all reserved for Mrs. Perry and Henry Hermann, “the good boy;” suppose the poor old man thought his life depended on Lena, and that if she died, although at that time *his income from his real estate was over forty thousand dollars per year*, he would be compelled to go to the hospital; suppose all this was true,—*whose* influence was it that brought about that state of mind on the part of the decedent? If proponents’ evidence be true, the clearest case of undue influence with reference to Lena and Henry Hermann would be established. The law upon such a state of facts would charge home upon Lena this undue influence. If at this time decedent possessed sufficient intellect to become the victim of undue influence, the following extract

from Judge Porter's opinion in *Tyler vs. Gardiner*, 35 N. Y., p. 590, would be directly in point :

"The observations in one of the opinions delivered in the Parish case are specially pertinent to this point. 'The whole evidence of the case,' says the learned judge, 'places him in a position where an enfeebled intellect, though far from losing its intelligence and its capacity to do ordinary business, may well be presumed unequal to resisting reiterated importunities from one in her relative position. It would seem plain that she could have exercised an influence in regard to this codicil which would not leave him to the exercise of his own free will. Are there any circumstances in this case to show that she did so ? Or does it appear that, having the power, she gained a victory over her naturally excited feelings, and magnanimously forebore to use it ? The whole burden of this codicil is for her benefit. Supposing that it was made under her control, *se scripsit hæredem* ; nor, upon this supposition, would Mr. Lord's presence, and the fact that Mr. Parish assented intelligently and deliberately and in detail to the provisions of the instrument, relieve her from that position ; for the influence was easily exercised when once its subject had been brought to submit to it, and in a way not at all suspicious—a way not likely to be observed by one who had no idea of its existence.'" (25 N. Y., 92.)

In discussing this branch of the case, we have a right to hold the proponents to all the legal consequences of their evidence. While we deny that Mr. Rollwagen made any such declarations, yet, if he did, then this branch of the case is clearly proven.

It was literally impossible for Mr. Rollwagen to have any intercourse or communication with anyone (had he possessed mental capacity) except through the Hermanns.

1st. They had absolute possession of his person.

2nd. They had possession of his entire estate ; they managed and controlled it in his name.

3d. Even his immediate relatives, his children and grandchildren, could not see him, except in Lena's presence.

4th. If anyone addressed him by letter, the correspondence was answered by Henry and Lena Hermann, they using their own names, or the name of the decedent, in writing, as best suited their purposes. *It would be impossible for a man thus situated (if he possessed mental capacity) not to be the victim of undue influence.*

I will now call your attention to the direct and specific proof of gross fraud on the part of Lena in respect to both will and codicil, if the evidence of proponents be true.

For the purpose of drawing the will and codicil, Lena and Henry Hermann manage to secure the services of one who is not in any way the counsel of Mr. Rollwagen. Henry Hermann thought it necessary to attempt an explanation of the fact that Mr. Geissenheimer did not draw these instruments. He testifies that Mr. Rollwagen told him to go for Bellesheim, and in the same connection he says Rollwagen stated that Mr. Geissenheimer had not acted as his lawyer for the past eight or nine years. That Mr. Rollwagen did not say this is proved, 1st, by the fact that he could not speak at all, and, 2nd, by the fact that Mr. Geissenheimer, as he testified, had been standing counsel for, and confidential adviser of, the decedent from 1846 up to the time of his death. We offered, as your Honor will remember, to prove that Mr. Geissenheimer was sent for, and refused to draw a will for decedent, because he believed that he at this time was incapable of making a will, and incapable of giving the necessary instructions for a testamentary instrument. We all know that Mr. Geissenheimer has a deservedly high standing at the bar—that he is an able, faithful, conscientious lawyer, who does his duty, his whole duty, and nothing but his duty. Instead of Mr. Geissenheimer, Lena and her brother secured the services of a good-natured, easy-going, buxom lawyer, who yielded

to the wishes of Lena, received his instructions from her, drew will and codicil as she directed, superintended the execution of these papers, became a subscribing witness to each,—the decedent, as this lawyer testified, never having said one word to him about either instrument, or any of the provisions contained in them.

There has been no testimony in this case in respect to any statements, conversations, or declarations of Mr. Rollwagen with reference to the will, except in the testimony of Mrs. Perry. Her evidence on this subject is as follows :

“ Q. Did he (Rollwagen) say anything at that time about a new will ?

“ A. Yes, sir.

“ Q. What did he say on that subject ?

“ A. He told me that he would alter his will. I wanted to know why. He said, because he had given the old house to Lena, or his wife, and he had sold that ; and that he had bought another, and he wanted her to have the “ other one.” (Fols. 4222-3.)

As already shown, Bellesheim testifies that at the time he received instructions for drawing the will, Rollwagen said nothing. Lena gave him the instructions. Lena gave him a will which Mr. Rosenstein had drawn. Lena professed to give the decedent's instructions to Mr. Bellesheim as to how he wanted the will drawn. Bellesheim testified that Lena said to him at the time as follows :

“ “ Here is the will which Mr. Rosentein drew for Mr. Rollwagen. Mr. Rollwagen wants to give me, instead of the house which he sold, the other house which he bought ; and he does not want to have Mr. Beers as executor in the will. In all other particulars it should remain the same.” (Fols. 155-6.)

So that, even according to what Lena stated to Bellesheim, Mr. Rollwagen only desired that the will which Bellesheim should draw, should be precisely like the previous will except in these two particulars, namely, that

the new house should be substituted for the old, which had been sold, and that Mr. Beers should no longer remain executor. The proof is clear and specific that in the former will Lena merely had the *use of the old house during her life*. This, like so many other important facts in the case, is proven by the express admission of Lena herself.

Barbara Koch testified on this subject as follows :

" She (Lena) said that father made a will, but that he did not give her anything of her own, but he let her live in the house in 9th street ; and he gave her so much that she would be able to live good, but nothing for her own ; that everything after this fell back to his children, and she had nothing for her own." (Fol. 3044.)

Here is the direct and unqualified admission of Lena herself upon this precise point. She has not seen fit to contradict this statement, for the reason that it is true. There is nothing in the evidence in any way impairing the force of this express admission of Lena upon this point. Whether the previous will gave Lena the use of the old house, 336 Ninth street, Bellesheim does not remember. On this subject he testifies as follows :

" Q. I repeat my question : do you recollect this provision in it [former will] that Mrs. Rollwagen was to have a life estate in the old house, to pay interest and taxes, that life estate to continue as long as she remained a widow ?

" A. I do not. * * * * *

" Q. You do not recollect either way, do you meam ?

" A. I do not recollect either way.

* * * * *

" Q. Do you mean that you recollect there was some provision ?

" A. I remember that in the Rosenstein will the house which you mentioned was given to her, *but I do not remember whether it was for a life estate or otherwise* ; that is what I mean by I don't know.

" Q. But she was given some interest in it ?

" A. Yes, sir.

" Q. What it was you don't remember ?

“ A. No, I do not ; *I do not know whether it was a life estate or whether it was in fee.*” (Fols. 359 to 361.)

Thus it most conclusively appears that, upon the evidence of the other side, there was no authority whatever on the part of Mr. Rollwagen that the will should be so drawn as to give Lena the new house 312 Ninth street, *in fee*. Here is direct proof of a gross fraud upon the decedent, provided he had sufficient mental capacity to be the victim of fraud. By means of this fraud Lena secures a house far more valuable than the former one ; has it expensively furnished and secures it to herself *in fee*. It was because Lena was so anxious to obtain this house, that she and Henry Hermann dragged the decedent up to the Murray Hill Bank, to be physically present while they, in his name, directed the officers of the bank to be sure and pay his check of seventeen thousand eight hundred dollars (\$17,800) which was to be used in the purchase of the new house. At the time Rollwagen was taken to the Murray Hill Bank for this purpose, his condition was pitiable. If that check were signed by Rollwagen, and the Bank officers were familiar—as they were—with his signature, what necessity was there to take him to the bank in his lamentable condition, and make such an exhibition of him ?

In the effort of proponents to show that Rollwagen was physically capable of speaking, they have proven an affirmative case of fraud of the blackest kind. We deny that he made the declarations imputed to him for the reason that it was physically impossible for him to speak, yet the other side are bound by the testimony they have given, and if it establishes, as it does on the theory that it is true, an affirmative case of undue influence and circumvention, they must take the consequences.

Having shown that upon the theory that the evidence of proponents is true, a clear case of fraud has been established in regard to the will, I will now demonstrate that *a still greater fraud has been practised with respect to the codicil*, according to their testimony. The only witness in the case

who testifies to anything which it is claimed that Mr. Rollwagen said in respect to the codicil, is Henry Hermann. He testifies that before the codicil was signed, Mr. Rollwagen never said anything to him about it (fol. 4938). He says the first time that Rollwagen spoke to him on the subject was about the 15th or 18th of September (fol. 4939). As to why Rollwagen made the codicil, Hermann testifies as follows :

“ Q. Did Mr. Rollwagen, at any time after the 24th of September, 1873, say anything to you about your sister ?

“ A. He did.

“ Q. What did he say on that subject ?

“ A. We were talking about the condition she was in.

“ Q. Do you remember what he said ?

“ A. He said that he had attached a codicil to his last “ will just on account of the condition she was in ” (fol. 4931-2).

That this testimony is fabricated, is beyond the possibility of question. As already demonstrated, Rollwagen could not speak at all ; but let us, for argument's sake, hold the other side to this evidence. If it be true, then the only object Rollwagen had in making the codicil—if he made it at all—was to provide for the forthcoming child. It is provided in the codicil that this child shall share the same as the other children. On this branch of the case we must take into consideration what Hermann swore that Rollwagen said on this subject, and the provision in relation to the child made in the codicil. *If this evidence be true, then a gross and infamous fraud was practised upon Mr. Rollwagen. Instead of making a codicil simply to provide for the forthcoming child, four valuable houses and lots are given in fee to Lena.* Here, then, upon the testimony of the other side, a clear, direct, and infamous case of fraud is established by the testimony of the proponents, if the evidence be true. If Rollwagen was aware that Lena was pregnant, and he desired to provide for her child, *why did not he make provision for it in the will which bears date the 17th of June, 1873 ?* If the evi-

dence of proponents be true, at that time—and long before—he was aware that she was pregnant. Mrs. Perry testifies that Rollwagen told her in April, 1873, that Lena was pregnant. In relation to a conversation she says she had in April, 1873, on this subject, she testifies as follows:

“I asked his wife—she looked very delicate—what ailed her; he, Rollwagen, made answer that he was going to “have another heir” (fol. 4224).

Mrs. Miller testifies that about April, 1873, Rollwagen told her that Lena was in the third month of her pregnancy (fols. 4109 and 4110). She also testified that at that time, that is to say, in the third month, (which would be the last of April or the first of May,) she, Mrs. Miller, observed that the baby clothes were being made in Mr. Rollwagen’s presence. She testified as follows:

“Q. Did he (Mr. Rollwagen) say who was in the third month?

“A. His wife.

“Q. Did you see any of the *baby clothes in the old house, in Mr. Rollwagen’s presence?*

“A. Yes, sir.” (Fol. 4110.)

Now if this testimony be true, and Mr. Rollwagen desired to make provision for this child, why did not he do it in the will of the 17th of June? The proof of proponents is positive, that for two months before this he knew that Lena was pregnant. It could hardly be expected that a clearer and more direct case of fraud could ever be established. Proponents are reduced to this alternative: either they have produced false testimony upon these points, or they are guilty of gross fraud; either horn of the dilemma is equally fatal to their case.

If the statement of Henry Hermann were true, that the decedent told him the only reason why he made the codicil was, that Lena was pregnant and he desired to provide for the forthcoming child, so that it would share equally with the others, there would have been no necessity for any cod-

icil at all, and any lawyer, competent to draw a testamentary instrument, would have so advised. I will take the liberty of citing in this connection the following provision of the Revised Statutes :

“Whenever a testator shall have a child born after the making of his will, either in his lifetime or after his death, and shall die leaving such child so afterborn unprovided for by any settlement, and neither provided for nor in any way mentioned in his will, every such child shall succeed to the same portion of the father’s real and personal estate as would have descended or been distributed to such child if the father had died intestate, and shall be entitled to recover the same portion from the devisees and legatees in proportion to and out of the parts devised and bequeathed to them by such will.” 3d Revised Statutes, p. 145, Sec. 44 (5th Ed.)

The fraud appearing on the face of the will and codicil is very apparent.

The provisions of the will and codicil are unjust. The provisions in these instruments giving Lena absolutely such a large portion of the real and personal estate, are grossly unjust. The provision giving her the five houses and lots in lieu of dower, is a fraud upon its face. In addition she gets one-third of the rents of all the rest of the real estate, which is tantamount to dower; in other words, she gets five houses and lots “in lieu of dower,” and then gets dower besides. I will not stop to discuss in detail the various provisions in these papers, which on their face show rank fraud.

The avarice and fraud of Lena and her family are very conspicuous in the will and codicil. Frederick Rollwagen, Jr., was made one of the executors, in order to give a slight degree of plausibility to these instruments. As the decedent owes no debts, the settlement of the estate is an easy matter. The duties of executors are clearly defined by

law. In an estate like the present, little would be left to the discretion of executors; but lest in this matter Frederick might have some little power, three of the Hermann family are joined with him; Lena is executrix, and Henry and George Hermann are executors. The fact that Henry Hermann is given power to let and rent the real estate, and manage and control it forever, is proof sufficient of gross and infamous fraud. Henry Hermann, who is thirty-two years old (fol. 5000), about the same age as Louis Rollwagen, had no claims on the decedent. Down to 1871, Hermann admits that he was not very intimate with Mr. Rollwagen. Before that he was not in the habit of seeing him oftener than once or twice a year, or perhaps sometimes two or three times in one year (fols. 4798-9). After Lena went to live with decedent in 1869, he says he was more intimate with him than previously. He does not pretend to anything approaching intimacy until after the alleged marriage with Lena. His conversations with Rollwagen were mainly after he had become dumb—after paralysis of the tongue had deprived him of the power of speech. Henry Hermann, *a year before this, admitted that decedent could not speak so that he could understand him.* Hermann stated this in May, 1872, to Sammy Browning, a grandson of Mr. Rollwagen (fol. 5464). That Hermann did so state no one, who heard this bright, intelligent, conscientious young man—Sammy Browning—testify, could doubt for one moment. That the fact was as Hermann stated, namely that in May, 1872, decedent could not speak, is true beyond all question. As shown by the most conclusive testimony, he could not speak at all after 1871. Hermann's business transactions with the decedent are all after the latter has become a speechless imbecile. Then, according to Hermann's evidence, his intimacy with the decedent progresses rapidly; within six months of Rollwagen's death, his whole property is taken possession of by Henry Hermann as agent; within four months of his death, Henry Hermann and his old mother are quartered upon

him and have taken possession of his residence. Thicker and faster the Hermanns come swarming down upon the paralytic old man, who is past the power of resistance. Within a few days after they have taken possession of his residence, the will is got up.

Why should Henry Hermann be placed over the children of the decedent? Why should the small interest in their father's estate, which is left them by the will and codicil, be confided to his tender mercies? Who is Henry Hermann that he should be appointed to rule over the sons of Frederick Rollwagen? Why, for example, should Henry Hermann be designated to take charge of the property of Frederick Rollwagen, Jr.? The decedent always had the most unbounded confidence in his son Frederick, who is a man of property, a thorough, careful, prudent, and successful business man. Frederick is thirty-nine years old, and, I presume, of much larger means than his father possessed at that age. The decedent regarded his eldest son—as well he might—with pride. If decedent had desired that anyone after his death should oversee his property, and keep it together, he certainly would not have thrust aside his eldest son—a man of excellent judgment, of integrity, of independence—and selected one in whose veins flowed no Rollwagen blood—one in every respect so far the inferior of his own son. The decedent would have selected one whose interest would be to make the most of the property, and take care of it properly. Hermann's interest would be directly the reverse; his interest would be to waste the income in needless repairs and alterations, in the profits of which he could secretly participate. Hermann has had no experience—aside from his connection with Rollwagen's affairs—in managing and taking charge of real estate. There is nothing to show that, if honestly disposed, his judgment or discretion is worth anything in such matters. The idea that the decedent, when in the possession of his faculties—when he was Frederick Rollwagen—would select a man like Henry Hermann and give him such powers as

are conferred upon him by the will, is preposterous to the last degree. There is nothing in the evidence to relieve the case of the gross and infamous fraud appearing on the face of the will and codicil. There is no testimony tending in any way to show that decedent lacked confidence in Frederick's judgment or discretion; the testimony as to his confidence in Frederick is explicit. Barbara Sheppard testifies that decedent, in speaking of Frederick, said "he preferred Fred.'s judgment to his own, because, he said, Fred. was in business and he (decedent) was out of occupation" (fol. 2720).

The will and codicil are in direct violation of the intentions of the deceased respecting the distribution of his property, as appears by all the evidence in the case.

The testimony is uniform in showing that the decedent always expressed the intention of leaving all his property to his children, and the children of his deceased daughter, Mrs. Browning.

I will call attention only to a few of the witnesses who speak upon this point. Anthony Dugro testified that he often conversed with him upon the subject of how he would leave his property by will. He states that decedent frequently conversed with him upon this subject after his first wife died, also after the decease of his second wife. Dugro says Rollwagen said, "He was going to leave his property to his four children after his first wife died" (fol 1528). He says he cannot remember the precise dates when Rollwagen spoke upon this subject, because "It was so many times—it was perhaps a dozen times we talked about it" (fols. 1529 and 1530). In another part of his evidence, Dugro says that Rollwagen repeatedly stated that in his will he would divide his property into four parts, that he would give one part to each of his three sons, and the re-

maining part to the children of his deceased daughter, Sarah Browning (fols. 1554-5)

Jacob Moore testified that the decedent frequently told him the same thing (fol. 2081). Charles Stephans and Barbara Sheppard testified that the decedent stated he should leave his property to his children.

This evidence is undisputed. There is no evidence in the case (except the testimony of Henry Hermann and Mrs. Miller, which I have just commented on) even tending to show that Mr. Rollwagen, after the death of his first wife, ever entertained a thought of doing otherwise than leaving his property to his children. There is some evidence given by one witness tending to show that decedent contemplated keeping his estate intact until his youngest grandchild living at the *time of his death* should attain the age of twenty-one years. But he never entertained the idea for a moment of diverting his property or the use of it from his children.

The decedent had no motive for disinheriting his children, or for leaving them less than the law would give them, in the event of his dying intestate.

Have proponents accomplished anything in their attempt to show a reason on the part of decedent for disinheriting his children? On this branch of the case Mrs. Miller, the old washerwoman, who swore to so many physical impossibilities, is brought into active service. It is sought to be shown by her that Rollwagen, during the last few months of his life, made certain declarations which have a relevancy upon this point. What are they? She testifies in substance that Rollwagen stated that, while he loved Mrs. Perry, was fond of Mrs. Schmoll, and barely liked Lena, he did not love his sons' wives. And that is the reason given why he should disinherit the sons and give the bulk of the estate to Lena, whom he regarded as not virtuous, and whom he

would not marry so long as he had strength of mind and body to resist, and whom, according to their theory, he only consented to marry as one degree of calamity less than death itself. What other reasons did they give? None whatever. Rollwagen and his children, according to the testimony, were on the best of terms. Search the evidence through and you see nothing but cordial relations existing between them; every witness who has testified on the subject says that Rollwagen spoke in the kindest manner of his children. Mrs. Schmoll, who testifies to physical impossibilities, who says that on the day Dr. Tully came to visit this man when he was paralytic and just dropping into his grave,—she says that on that very day he was strong, talked to her, and grasped her with his right hand firmly and strongly,—this woman testifies that this man said that these children had made him trouble.

Another declaration was put into the mouth of Rollwagen—that some of his sons spent too much money. With a great flourish of trumpets the proponents brought out the fact from one witness that decedent said he did not want George to get married, because he thought that he had a good home where he was. These are the attempts to explain the alleged conduct on the part of Mr. Rollwagen, on the theory that he was sane, and on the theory that he executed the will and codicil.

Such is the result of the miserable attempt to impute to Mr. Rollwagen a motive for substantially disinheriting his children, in order to increase the enormous wealth of Lena, to which it is claimed she became entitled by the fact of marriage.

The general scheme of fraud in which Lena had been so long engaged she pursued to the last. On the 24th of September, after she had, in addition to the will, obtained a codicil giving her four additional houses and lots, and nothing more was to be gained from Frederick Rollwagen, when Dr. Tully was called, and he told her the case was hopeless, the patient's life could be prolonged but a short

time at longest, perhaps a few days, she did not acquaint the sons, or any of the decedent's family, with this opinion of the attending physician. On the day before he breathed his last, she told the gas collector that the decedent was about to die; she turned down the clothes and showed that the work of death had already begun. Yet no word respecting his condition would she send to his sorrowing and afflicted family. When the final hour came, so deeply was she absorbed in her scheme to obtain his property, she would not even then pause in her career of moral crime. When his heart had beat for the last time—when he lay before her a corpse—her first words were a refusal to permit the sad news to be borne to his sons. The other side felt the force of this evidence, and sought to palliate this atrocious conduct on the part of Lena.

Was there ever a more revolting spectacle than when that old woman—Mrs. Miller—came upon the stand and swore that Mr. Rollwagen, just before his death, said, “If I die I don't want my sons around me.” Those same sons had visited him day after day during his illness; Louis was there constantly; Frederick, being more active in business, was there every week, or oftener—usually every Sunday. Is it probable, when their presence was so agreeable to him (if he possessed mental capacity sufficient to know they were there), is it likely that Rollwagen would state: “Although these are my children, and have been the objects of my affection during my whole life, when I die don't let them come near me; I will leave them a legacy of malice”? It is unnatural. There is not a human being in the world who, under such circumstances, would utter such a declaration as the perjured testimony imputes to the decedent.

I will now call your Honor's attention to a statement, by way of recapitulation, of a few of the prominent facts which I have established under my fourth and last point.

I have shown that Lena Hermann and her family, as early as 1869, began to carry into execution a deep and cunningly-laid plan to obtain Mr. Rollwagen's estate.

I have shown that from 1869 to 1871 the decedent peremptorily refused to marry Lena. This is shown by the admission of Lena herself, who stated that he repeatedly refused to marry her, and said that he was ashamed to do so.

I have shown that when the decedent finally fell a victim to the designs of Lena Hermann and her family, and the marriage ceremony was performed, he was a physical and mental wreck, and did not possess the power of communicating his thoughts (if he had any) by speech or otherwise.

I have shown that the power which Lena exercised over the decedent, she acquired from her position as servant and housekeeper for him, and her relationship to his first wife, namely, that of blood niece.

I have shown that immediately after Lena went into the decedent's employ as housekeeper in 1869, she succeeded in so managing that his son Louis and his wife, who were then living with decedent and keeping house for him, within a few weeks left.

I have shown that as early as September, or thereabouts, in 1872, George, the youngest son of decedent, the only member of his family then residing with him, left for the State of California, and thus Lena secured absolute and despotic control over the person of the decedent.

I have shown from Lena's own admissions, made subsequent to the time she obtained sole and exclusive control over the person of the decedent, that he had no confidence in her virtue—that, to use her phraseology in respect to her virtue, "he did not trust her."

It appears by the evidence that late in February, 1873, when decedent, who had been for two years paralyzed, and was at the point of death—just after Lena had sent to his sister and niece to come and visit him if they ever expected to see him again alive,—Lena became pregnant. At this

time the testimony shows that the decedent could only sit up about long enough to have his bed made, and that he could not move or stir in bed except as he was lifted by others. Lena said she had to expend so much strength in moving him, it seemed as though it would break her back.

The evidence shows that at this time, and for a long time previous, Rollwagen was impotent. In addition to other proof, which is conclusive, this fact is shown by the express admission of Lena.

The evidence proves that from about the time of the alleged marriage in September, 1871, down to the moment of the decedent's death, Lena under no circumstances would permit any of decedent's children or grandchildren to see him for so much as a single moment except in her presence.

Although Lena would not permit decedent to see his children or grandchildren except in her presence, yet she constantly allowed her partisan friends (who in this case have sworn to so many physical impossibilities) to be alone with him to any extent. Mrs. Perry and Mrs. Schmoll, according to the evidence of proponents, were with decedent often and long when no one else was present. The object of this, of course, was, if decedent possessed any mind, that he might be moulded to Lena's wishes and purposes.

In her great anxiety to prevent the return of George from California, in her letters to him in the Summer of 1873, Lena falsely stated that decedent's health was as good as when he (George) left, early in the Fall of 1872. This false statement in regard to decedent's health she repeated continually in her letters to George during the past Summer.

The testimony shows that in her letters to George in 1873, although decedent was not able to utter a word or syllable which could be understood, Lena continually stated that his father peremptorily forbade his return to the city of New York.

In these letters to George, Lena gave harsh and unfeeling messages to him from his father, which she falsely represented that he desired her to send.

The evidence proves that in February, 1873, Lena disclosed her plan for getting possession of the decedent's estate, which was that the agent he then had should be discharged, and her brother, Henry Hermann, should take his place. On the 15th of April this was accomplished.

After Lena had obtained absolute possession and control, not only of the person but of the entire property of the decedent, she immediately put in execution her plan for obtaining his estate after his death.

Lena and Henry Hermann, in the name of Rollwagen, purchased a new and much better house than decedent had been accustomed to occupy, and took possession of it about the middle of June, 1873.

On the 17th of June, 1873, Lena, her brother Henry Hermann, and her mother, having taken possession of the new house, the will was got up, and there was a pretended execution of it in that house.

The direct and immediate fraud of Lena in respect to the will is clearly established. If proponents' evidence be true, she caused to be given to herself the new house *in fee* without the knowledge or consent of Rollwagen.

Gross fraud appears on the face of the will. The evidence shows that Rollwagen would never have consented that Henry Hermann should take charge of his estate and manage it forever, to the exclusion of his own sons, and especially his eldest son, who is in large business, entirely responsible, and in whose business capacity the decedent had the most entire confidence.

The direct and outrageous fraud of Lena in respect to the codicil, is clearly proven. If proponents' evidence be true,

under pretence of making provision that the forthcoming child should share equally with the others, she caused to be inserted in the codicil a provision giving to her *in fee* four additional houses and lots. If the evidence of proponents in regard to the codicil be true, Rollwagen was entirely ignorant that it contained any such provision.

It is proved by Lena's admission, and the evidence of Henry Hermann, that they would permit Rollwagen to sign no papers except such as they approved. In most cases where undue influence in regard to the execution of papers is sought to be established, reliance is had alone upon circumstances from which the Court is asked to infer its existence. Here, not only the strongest circumstantial proof exists, but we have the direct admission of the chief party in interest, Lena, that she would permit Rollwagen to sign no papers except such as suited her. We have her direct admission that she prevented the signing of any papers by Rollwagen which did not accord with her views.

The undisputed and uncontradicted evidence shows that the will and codicil are in direct violation of the intentions of Mr. Rollwagen, expressed by himself while he was able to communicate his wishes, and before he became speechless.

No motive whatever appears in the evidence to render it even plausible that Rollwagen, under any circumstances, would make such testamentary instruments as are here propounded for probate. The relations between him and his children and grandchildren, according to the evidence, were of the most kind and cordial character. The attempt to show any disagreement between Rollwagen and his children utterly failed.

The evidence shows that if by possibility decedent could have had any hostile or unkind feelings towards his children or any of them, it must have been solely through the undue influence and despotic control exercised over him by Lena and her family.

The evidence shows that Lena continued to carry out her deep-laid scheme of avarice and fraud down to the moment of the death of decedent, and even beyond. Her refusal to permit his sons to be immediately apprised of his death is shocking and revolting to the last degree.

The evidence shows that if Lena were actually and legally married to the decedent, as she claims, the fact of marriage raised her from a condition of poverty to that of affluence, and there was no palliation for her cunningly-devised and deep-laid plan to rob the decedent's children, who are her own blood cousins, of their portion of their father's estate.

This case, although very voluminous, is neither difficult nor complicated. The law is clear; its application to the facts is easy. The whole case may be summed up as follows:

The proponents, with reference to the will and codicil, have not proved the observance in letter and spirit of *any* of the statutory requirements with regard to the execution of testamentary instruments. There is *an entire failure of proof* on the part of proponents; and for this reason, the contestants, as matter of right, are entitled to a decision in their favor.

I have demonstrated, by undisputed facts, and by an overwhelming preponderance of evidence, each and every of the following propositions, the successful maintenance of any one of which renders it the bounden duty of your Honor to refuse to admit either will or codicil to probate:

I.—The physical condition of the decedent was such, before and at the time of the execution of the will and codicil, that whether he possessed testable capacity or not, it was impossible for him to cause his testamentary intentions to be so embodied in a written instrument that the law would adjudge such instrument to be his will or codicil, for the

reason that he could not communicate his thoughts and wishes by speech, by writing, or by signs.

II.—The decedent did not, *in point of fact*, sign the will or codicil, nor did he in any way authorize anyone to sign his name to either instrument, or to guide his hand, or in any manner to aid him in signing. He did not, *in point of fact*, acknowledge or publish either will or codicil as his testamentary instrument. He did not, *in point of fact*, request anyone to become a subscribing witness to the will or codicil.

III.—If all the testimony of contestants were stricken out, and the case rested *solely* upon the evidence of proponents, and *the most favorable construction should be given to that evidence*; upon the facts and circumstances surrounding the execution of the will and codicil, as appears by the evidence of the subscribing witnesses, the Surrogate would be compelled as matter of law to refuse to admit to probate either instrument.

IV.—The making of the will and codicil, and the execution of them (aside from the question whether decedent possessed testamentary capacity), were brought about by undue influence, fraud, and circumvention, and on this ground it is the imperative duty of the Surrogate to refuse to admit either instrument to probate.



111

